

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 844

HAROLD A. BOIRE, REGIONAL DIRECTOR,  
TWELFTH REGION, NATIONAL LABOR  
RELATIONS BOARD, PETITIONER,

vs.

THE GREYHOUND CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 1]

**IN UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

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**Case No. 4414-Civil T.**

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**HAROLD A. BOIRE, Regional Director, National Labor  
Relations Board, APPELLANT**

**vs.**

**THE GREYHOUND CORPORATION, a Delaware Corporation,  
APPELLEE**

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**COMPLAINT—Filed May 23, 1962.**

**THE GREYHOUND CORPORATION, a corporation organized and existing under and by virtue of the laws of the State of Delaware, plaintiff herein, complaining against HAROLD A. BOIRE, AS REGIONAL DIRECTOR, TWELFTH REGION, NATIONAL LABOR RELATIONS BOARD, respectfully shows:**

**1. The plaintiff herein is a Delaware corporation, having its principal place of business at Chicago, Cook County, Illinois, is engaged primarily in the business of interstate motor carriage of persons and freight, and is engaged in such business within the area comprising the Tampa Division of the Southern District of Florida. [fol. 2] Southern Greyhound Lines Division is an operating division and not a separate corporation.**

**2. The defendant is Harold A. Boire, against whom this action is brought in his capacity as Regional Director of the Twelfth Region of the National Labor Relations Board, the principal offices of which Region are located in Tampa, Hillsborough County, Florida, and the said defendant is a resident of Hillsborough County, Florida.**

**3. This is a civil action arising under an Act of Congress regulating commerce, to-wit, the Labor Management**

Relations Act, 1947, as amended (29 USC, Section 151, et seq., also known as the National Labor Relations Act, and hereinafter referred to as the "Act").

4. The execution of the election order of the National Labor Relations Board, hereinafter referred to would constitute a denial of due process to the plaintiff, and said execution would be an arbitrary, unjust, and illegal abuse of the power of said Board, and this Court has jurisdiction to enjoin the execution of said election order, the plaintiff having property rights entitled to protection by this Court sitting as a Court of Equity under the due process clause of the Constitution of the United States, to-wit, the Fifth Amendment to the Constitution of the United States.

5. This Court has jurisdiction of this action by virtue of the provisions of Sec. 24 (8) of the Judicial Code, 28 USC, Sec. 1337.

6. The defendant, unless enjoined as herein prayed, will deprive the plaintiff of rights accruing to plaintiff under and by virtue of said Act, said rights being not to be a party to a representation proceeding under said Act where the persons constituting the unit for purposes of collective bargaining are not the employees of the plaintiff. [fol. 3] Plaintiff's right arises out of the following provisions of the Act:

(a) Sec. 9 (c) (1) of the Act, which provides as follows:

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that *their employer* declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by *their employer* as the bargaining



representative, is no longer a representative as defined in section 9 (a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." (Emphasis added.)

(b) Sec. 2 (3) of said Act, which provides that the term "employee" shall not include any individual having the status of an independent contractor.

[fol. 4] (c) Sec. 8 (a) (5) of said Act, which provides that it shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees.

(d) Sec. 9 (a) of said Act, which provides that representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

7. The findings of the National Labor Relations Board contained in the footnotes to the Decision and Direction of Election in case No. 12-RC-1209, attached hereto and incorporated herein by reference as Exhibit "A", are in excess of the National Labor Relations Board's delegated powers and contrary to the provisions of the Act, and the same are arbitrary and capricious and without authority in law or fact, and violate plaintiff's rights under said Act, as hereinabove set forth.



8. The said findings of said Board show on the face of the said Decision and Direction of Election that the plaintiff is not the employer of the persons alleged to constitute an appropriate unit as set forth in said paragraph 4 of said Decision and Direction of Election, in that the very findings show that the employer of the persons in said unit is Floors, Inc., of Florida, and not the plaintiff, and that the actions of the plaintiff with respect to such employees of Floors, Inc., of Florida are insufficient in law to make the plaintiff the employer of such employees.

9. The plaintiff and Floors, Inc., of Florida have no common identity and do not constitute a single entity or [fol. 5] a joint entity, in that the two corporations do not have common directors, common stockholders, common officials, or any mutuality of operating control. Thus, the two corporations could not lawfully be required to bargain collectively with representatives of the persons in the alleged appropriate unit as the term collective bargaining is defined in Sec. 9 (a) of the Act.

10. In addition to the factors described in the aforesaid Decision and Direction of Election, constituting the relationship between Floors, Inc., of Florida and its employees, Floors, Inc., of Florida also pays social security taxes with regard to such employees, withholds Federal income taxes of such employees, maintains unemployment compensation for such employees, maintains workmens' compensation for such employees, trains such employees for their particular jobs, supervises such employees, and selects such employees as it sees fit. The plaintiff does none of these things with respect to such employees.

11. As a matter of law, the employees of an independent contractor such as Floors, Inc., of Florida cannot at the same time and place and with regard to the same employment be the employees of plaintiff.

12. Under date of May 3, 1962, the National Labor Relations Board issued and mailed to the plaintiff its Decision and Direction of Election in said Board's case No. 12-RC-1209, a true and correct copy being Exhibit "A" attached hereto.

13. As more fully appears in said Decision and Direction of Election, the defendant has been ordered and di-

rected to direct and supervise an election within thirty (30) days from and after May 3, 1962, wherein certain porters, janitors and maids working at the plaintiff's bus terminals in Miami, St. Petersburg, Tampa and Jackson-[fol. 6] ville, Florida, will cast their secret ballots to determine whether or not they desire to be represented by the labor union named in said Decision and Direction of Election for the purposes of collective bargaining with plaintiff and Floors, Inc., of Florida, predicated upon a finding by a majority of the National Labor Relations Board, as set forth in the footnotes of said Decision and Direction of Election, that the plaintiff and said Floors, Inc., of Florida are joint employers of said employees.

14. In the hearing on this matter which preceded the issuance of the Decision and Direction of Election in the National Labor Relations Board case No. 12-RC-1209, the plaintiff vigorously asserted and adduced evidence in support of its contention that it was not the employer of the persons comprising the unit described in said Decision and Direction of Election.

15. One or more days subsequent to May 11, 1962, the plaintiff received from the office of the defendant a copy of a letter dated May 11, 1962, addressed to Alexander E. Wilson, Jr., Esquire, with a carbon copy to plaintiff, a true and correct copy thereof being attached hereto and incorporated herein by reference as Exhibit "B".

16. The plaintiff received, one or more days subsequent to May 17, 1962, a letter addressed to one of its attorneys from the office of the defendant; dated May 17, 1962, a true and correct copy of which letter is attached hereto and incorporated herein by reference as Exhibit "C".

17. It is evident from Exhibits "A", "B" and "C", attached hereto, that the proposed election, of which plaintiff complains herein, will be held and conducted by the defendant on or about May 28 or May 29, 1962, unless the same be restrained and enjoined, as herein prayed.

[fol. 7] 18. The plaintiff and Floors, Inc., of Florida, a wholly owned subsidiary of Floors, Inc., a Georgia corporation, are parties to agreements, true and correct copies of which are attached hereto and incorporated

herein by reference as Exhibits "D-1", "D-2", "D-3", "D-4" and "D-5".

19. In Civil Action No. 3047 in the United States District Court, Southern District of Florida, Jacksonville Division, wherein the plaintiff herein was the plaintiff and the petitioning union in National Labor Relations Board case No. 12-RC-1209 was the defendant, the Honorable Bryan Simpson, United States District Judge, made and caused to be entered an Order and Findings of Fact and Conclusions of Law in support thereof, both dated July 27, 1955, wherein said Court found Floors, Inc., of Florida to be an independent contractor with regard to the contract between plaintiff and Floors, Inc., of Florida, attached hereto as Exhibit "D-1". A certified copy of said Order is attached hereto and incorporated herein by reference as Exhibit "E-1", and a certified copy of said Findings of Fact and Conclusions of Law is attached hereto and incorporated herein by reference as Exhibit "E-2".

20. The plaintiff has no adequate remedy at law for the following reasons:

(a) If the election be held, and the persons comprising the unit described in the Decision and Direction of Election vote in the majority for the proposed union representative, plaintiff will have no right of judicial review whatsoever until and unless plaintiff refuses to bargain with said selected representative and is charged with and found guilty of committing an unfair labor practice by such refusal, and a proceeding for enforcement is initiated by and prosecuted by the National Labor Relations Board in the United States Court of Appeals for [fol. 8] the Fifth Circuit, all of which procedure is contingent and costly and constitutes unconscionable delay in the judicial determination of plaintiff's rights.

(b) If a majority of the persons comprising the purported appropriate unit as described in the Decision and Direction of Election vote against being represented by the union seeking representative status, the plaintiff will have no recourse to determine its legal rights and status.

(c) So long as the conclusion of the National Labor Relations Board, as expressed in the Decision and Direc-

tion of Election in case No. 12-RC-1209 is effective, said Decision will represent a real or apparent determination that the persons in the said unit are the employees of plaintiff, and plaintiff may readily be the victim of concerted activities on the part of said employees, from which plaintiff could and would suffer irreparable loss and damage.

(d) So long as said Decision and Direction of Election is extant, and has not been effectively set aside by judicial decree, plaintiff will be subjected to being charged with responsibility for social security, unemployment compensation, workmens' compensation, and similar matters with respect to such persons.

21. The action by the defendant and those subject to his authority and direction, as proposed in Exhibits "A", "B" and "C" attached hereto, is without authority of law.

WHEREFORE, plaintiff respectfully prays:

(a) That this Court enter instanter its temporary restraining order, pending hearing, temporarily restraining and enjoining the defendant and all persons acting in the stead of the defendant or under the direction or control of the defendant from conducting a representation election pursuant to the above referred to Decision and Direction of Election of the National Labor Relations Board in that Board's case No. 12-RC-1209.

[fol. 9] (b) That this Court issue its rule to show cause, directed to the defendant, requiring the defendant to be and appear before this Court on a day certain to show cause, if any he can, why a temporary injunction should not issue restraining and enjoining the defendant and all persons acting in the stead of the defendant or under the direction and control of the defendant from conducting a representation election pursuant to the above referred to Decision and Direction of Election of the National Labor Relations Board in that Board's case No. 12-RC-1209; and that upon the hearing on said show cause order, a temporary injunction issue so restraining and enjoining the defendant.

(c) That upon final hearing, this Court issue a permanent injunction, permanently restraining and enjoining



the defendant and all persons acting in the stead of the defendant or under the direction and control of the defendant from conducting a representation election pursuant to the above referred to Decision and Direction of Election of the National Labor Relations Board in that Board's case No. 12-RC-1209.

(d) That this Court issue an appropriate order striking down and setting aside the said Decision and Direction of Election, herein referred to.

(e) For such other and further relief as in equity may be deemed meet and proper.

/s/ Warren E. Hall, Jr.

/s/ Chesterfield H. Smith

/s/ Wofford H. Stidham

Address:

P. O. Box 1068

245 South Central Avenue

Bartow, Florida

Attorneys for Plaintiff.



[fol. 10] EXHIBIT "A" TO COMPLAINT

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD  
THE GREYHOUND CORPORATION (SOUTHERN GREYHOUND  
LINES DIVISION) AND FLOORS, INC. OF FLORIDA,<sup>1</sup>  
EMPLOYER,

and

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC  
RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,  
AFL-CIO, PETITIONER

Case No. 12-RC-1209

Decision and Direction of Election

Upon a petition duly filed, a hearing was held before a hearing officer of the National Labor Relations Board. His rulings made at the hearing are free from prejudicial error and are affirmed.

Upon the entire record, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organization(s) named below claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer, within Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

[fol. 11] 4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within Section 9 (b) of the Act:

All porters, janitors<sup>2</sup> and maids working at the Greyhound Corporation's bus terminals in Miami, St. Petersburg, Tampa and Jacksonville, Florida, excluding all other

<sup>1</sup> Names appear as corrected at the hearing. Herein, they are referred to as Greyhound and Floors, respectively.

<sup>2</sup> The Petition was amended at the hearing to include janitors.

**employees of the Greyhound Corporation and Floors, Inc. of Florida.<sup>3</sup>**

<sup>3</sup> Petitioner seeks a single unit of all porters, janitors and maids employed in the above-described Greyhound terminals, contending that Greyhound is the Employer of the employees sought, or at least their joint employer with Floors, and that the unit is appropriate as a residual unit of all unrepresented Greyhound employees at the terminals in issue. Alternatively, Petitioner contends that even if the Board finds that the employees sought are employed by Floors, and that Floors is an independent contractor, the unit sought is still appropriate because such employees comprise a homogeneous, distinct group. Greyhound and Floors contend that the porters, janitors and maids are employed by Floors, an independent contractor, and Floors further argues that the appropriate unit consists of either all its employees in the above-described cities or three separate units of all its employees in (1) Tampa-St. Petersburg, (2) Miami, and (3) Jacksonville. Petitioner is unwilling to represent Floors' employees who do not work at the above-described terminals.

It appears that Floors hires, pays, disciplines, transfers, promotes and discharges the porters, janitors and maids. However, it also appears that Greyhound's terminal managers confer with Floors' supervisors in setting up work schedules and in determining the number of employees required to meet those schedules. Moreover, it also appears that Floors' supervisors may visit the Greyhound terminals on an irregular basis and on occasion may not appear for as much as two days at a time; and that the employees sought, including porters in handling baggage, receive work instructions from Greyhound terminal officials. In addition, the record also shows that Greyhound, on one occasion, prompted the discharge of a porter whom it felt to be an unsatisfactory employee. In view of the common control over the employees sought, we find both Greyhound and Floors to be their joint employer. See *Panther Coal Company, Inc., et al.*, 128 NLRB 409, *West Texas Utilities Company*, 108 NLRB 407, 413-414, *enfd* 218 F.2d 824 (C.A. 5); *cert. denied*, 349 U.S. 953. We find further that such a unit consisting of all employees under the joint employer relationship is appropriate.

**PHILIP RAY RODGERS, MEMBER, dissenting:**

On the basis of the record herein, I would find that the employees sought are employees of Floors, that Floors is an independent contractor, and that the only appropriate unit is one comprised of all of Floors' employees in the above-described localities. Accordingly, I would dismiss the petition.

Philip Ray Rodgers,  
Member

National Labor Relations Board

[fol. 12]

## Direction of Election

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or re-[fol. 13] instated before the election date. Those eligible shall vote whether (or not) they desire to be represented for collective bargaining purposes, by Amalgamated Association of Street, Electric Railway and Motor Coast Employees of America, AFL-CIO.

FRANK W. MCCULLOCH,  
Chairman,

BOYD LEEDOM,  
Member,

JOHN H. FANNING,  
Member,

GERALD A. BROWN,  
Member,

(Seal)

National Labor Relations Board.

Dated, Washington, D. C., May 3, 1962.

EXHIBIT "B" TO COMPLAINT  
NATIONAL LABOR RELATIONS BOARD  
TWELFTH REGION

Ross Building, 112 East Cass Street, Tampa 2, Florida  
Telephone 2-4623

May 11, 1962

Re: Southeastern Greyhound Lines, and Floors, Inc.  
Case No. 12-RC-1209

Alexander E. Wilson, Jr., Esq.  
615 Rhodes-Haverty Building  
Atlanta, Georgia

Dear Mr. Wilson:

As you know, the Decision and Direction of Election in this matter requires that the election be held within thirty days from May 3, 1962, the date of issuance thereof, which means not later than June 1, 1962.

[fol. 14] Accordingly, on the assumption that the Board will take early action on your motion for reconsideration and that such motion may possibly be denied we propose to promptly pursue the working out of tentative election arrangements and request your cooperation to that end. Will you, therefore, please promptly furnish us with the following:

1. Suggested date of election. A date mutually agreeable to the Petitioner is, of course, desirable.
2. Suggested hours of voting at each location which will afford reasonable opportunity for all to vote.
3. Suggested exact location on the employer's premises in each terminal where the vote can best be conducted.
4. Eligibility date for election which shall be the last payroll immediately preceding May 3, 1962, the date of the Decision. If different in the various cities, so state and give the date for each location involved.



5. Time and place of preelection conference to check eligibility list. Normally this precedes the start of the scheduled voting by at least one hour. In this instance, it can possibly be handled by a central conference at this office. If centrally held at this office or at any other point it must be sufficiently in advance of the election for us to then deliver or send the eligibility voting lists to the Board Agents who will conduct the elections at the various polls, or in the alternative, possibly separate conferences at each of the polls shortly before voting time may be desired.
6. Shall ballots be impounded at each poll for sending or delivery to this office for commingled count of ballots?

[fol. 15] Your prompt and full cooperation in developing the needed facts relative to this election will be appreciated.

Very truly yours,

/s/ Norman A. Cole  
Assistant to Regional Director

CC: Floors, Inc.  
840 DeKalb Avenue, Atlanta, Georgia

Southeastern Greyhound Lines  
5260 Peachtree Industrial Blvd., Chamblee, Georgia

Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO, 67 Willowood Circle, S.E., Atlanta, Ga.

I. J. Gromfine, Esq.

Zimring, Gromfine & Sternstein  
1001 Connecticut Ave., Washington, D. C.

P.S. The observations and suggestions of the petitioning labor organization are likewise solicited.



## EXHIBIT "C" TO COMPLAINT

## NATIONAL LABOR RELATIONS BOARD

## TWELFTH REGION

Ross Building, 112 East Cass Street, Tampa 2, Florida  
Telephone 223-4623

May 17, 1962

Re: The Greyhound Corporation (Southern  
Greyhound Lines Division) and Floors,  
Inc. of Florida Case No. 12-RC-1209

Arthur W. Milam, Esq.  
1200 Greenleaf Building  
Jacksonville, Florida

Dear Mr. Milam:

Through oversight, a copy of our letter of May 11 to Mr. Wilson was not sent to you as counsel for The Greyhound Corporation (Southern Greyhound Lines Division), but it is enclosed herewith. However, possibly Mr. Wilson, as counsel for Floors, Inc. of Florida, may have been in touch with you already relative to the facts contained therein.

As you know, Mr. Wilson, in behalf of Floors, Inc. of Florida, has filed a Motion for Reconsideration. However, in the meantime it is necessary that we proceed with the election arrangements.

Since I believe the terminals are under the control of your client, doubtless your client is in position to furnish us with most, if not all, of the information requested in our letter of May 11. Since we must proceed with all possible haste in working out these election arrangements, please note that I will telephone you Friday afternoon, May 18, by which time I hope you may be able to have answers to at least some of the questions for us.

The thought occurs that possibly the baggage room might be suitable as a place for the election, although possibly other even better space may be available. It is

also suggested that the election time should perhaps straddle the afternoon shift change which I understand is at 3:00 p.m. in all four terminals involved herein. If it is deemed necessary to hold an additional early morning voting session at about 7:00 a.m. to cover the few who work on the third shift, that, of course, is agreeable with us.

We assume that your client is ready and willing to make the usual posting of election notices at the terminals at such time as we mail them directly to such points for posting. It is suggested you may wish to so instruct the terminal managers in advance, so that when the notices are mailed there will be no delay in such posting.

[fol. 17] As of now, we are thinking in terms of possibly conducting the election on either May 28 or May 29 and you will understand, therefore, that we must move along rapidly with election arrangements.

Very truly yours,

NORMAN A. COLE

Assistant to Regional Director

AIRMAIL

Enclosure

cc: The Greyhound Corporation  
(Southern Greyhound Lines Division)  
5260 Peachtree Industrial Blvd.  
Chamblee, Georgia

The Greyhound Corporation  
(Southern Greyhound Lines Division)  
1352 Vega Street  
Jacksonville, Florida

Alexander E. Wilson, Jr., Esq.  
615 Rhodes-Haverty Building  
Atlanta, Georgia

Floors, Inc. of Florida  
840 DeKalb Avenue  
Atlanta, Georgia

## EXHIBIT "D-1" TO COMPLAINT

STATE OF FLORIDA  
COUNTY OF DUVAL

THIS AGREEMENT entered into this 11th day of November, 1954, by and between FLOORS, INC., a Georgia corporation of Atlanta, Fulton County, Georgia, Party of the First Part, and FLORIDA GREYHOUND LINES (DIVISION OF THE GREYHOUND CORPORATION) of Jacksonville, Duval County, Florida, Party of the Second Part:

## WITNESSETH:

For and in consideration of the premises and of the mutual covenants contained herein, it is agreed as follows:

1.

Party of the First Part agrees that beginning on the 28th day of November, 1954, at 12:01 o'clock A. M., it will provide and perform twenty-four (24) hour daily janitorial and loading services at the Greyhound Bus Terminal, 204 West Bay Street, Jacksonville, Florida, in accordance with the description and definition of work set out in the supplementary schedule "A", initialed by the parties, attached hereto, and made a part hereof.

2.

Party of the First Part further agrees that all work provided for herein shall be performed on schedule to the satisfaction of the terminal management, except when prevented by strike, act of God, accidents or other circumstances beyond its control. A joint inspection of all service schedules and of all work performed will be made at least once each month.

3.

Party of the First Part further agrees to furnish bonded labor and supervision, together with such materials and equipment as may be necessary to satisfactorily perform its obligations under this contract, and to comply

fully with all applicable laws and the rules, regulations and requirements of all regulatory bodies having jurisdiction.

[fol. 19]

4.

Party of the First Part further agrees that at all times during the term of this contract it will maintain workmen's compensation, bodily injury, property damage and liability insurance, and that it will furnish to Party of the Second Part certificates which shall evidence this insurance, properly insuring both parties hereto.

Party of the First Part further agrees to protect, defend, indemnify and hold harmless Party of the Second Part, its officers, agents, servants and employees with respect to any loss, claims, liabilities or damages of any nature whatsoever which may arise out of the performance of this agreement with Party of the Second Part, and will furnish to Party of the Second Part certificate which shall evidence this insurance carried for this protection.

5.

Party of the Second Part agrees to pay Party of the First Part an annual sum of Fifty-three Thousand Seven Hundred and Sixty-Eight Dollars (\$53,768.00) for all services performed hereunder. This contract amount shall be payable in equal weekly installments of One Thousand and Thirty-Four Dollars (\$1,034.00) payable within seven (7) days after receipt of billing

Party of the First Part agrees to reduce the stipulated weekly billing of One Thousand and Thirty-four Dollars (\$1,034.00) proportionately for all reductions in man hours per week below seven hundred and sixty-five (765) man hours, such adjustments to be applied beginning the first whole work week following the week in which the revision was made.

Party of the First Part agrees to keep detailed cost records of services performed and after the figures for the [fol. 20] first ninety (90) days of operation under this contract are available will promulgate an hourly rate for services performed and offer it for consideration by Party



of the Second Part in the event it results in a lesser payment. Similar analysis will be made on the same basis quarterly by the Party of the First Part.

## 6.

It is mutually agreed between the parties that this agreement shall continue from year to year, provided, however, that either party may terminate this contract by serving thirty (30) days' written notice of its intention to terminate upon the other party at any time.

## 7.

It is further mutually agreed between the parties that if unforeseen difficulties arise due to the existence of labor contracts Party of the Second Part has the right to postpone the effective date, temporarily suspend or terminate this contract without advance notice being required. Should termination be necessary within the first ninety days of this contract, Party of the Second Part will pay Party of the First Part the actual cost of special cleaning, not to exceed Three Hundred Dollars (\$300.00), which shall be in addition to pro rata billing for normal services:

This contract contains the entire agreement between the parties hereto, and confirms all of the understandings and representations and supersedes any and all previous agreements between the parties, both oral or written, concerning the subject matter hereof.

[fol. 21] IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals, this 11th day of November, 1954.

Floors, Inc.

(Seal)

By /s/ A. R. Andrews  
Sales Manager  
Florida Greyhound Lines  
(Division of the Greyhound  
Corporation)

(Seal)

By /s/ P. G. Howe  
President



## SCHEDULE "A"

### PART I

#### CLEANING SERVICES SCHEDULES

**AREAS:** Entire building of Greyhound Bus Terminal, 204 West Bay Street, Jacksonville, Florida, with exceptions only as follows:

- Exceptions:**
1. Restaurant.
  2. Men's restroom adjoining main waiting room.
  3. Gordon Pillow Service room.

**TIMES:** Cleaning services shall be continuous, twenty-four hours daily, seven days weekly, commencing on starting date and continuing uninterrupted.

#### DAILY SERVICES:

**DESKS, COUNTERS, EQUIPMENT, LEDGES, SILLS, RAILS, etc.,** will be dusted.

**RESTROOMS:** (with exception of White Men's)

1. **FLOORS** will be soap mopped and rinsed.
2. **URINALS, COMMODOES, BASINS** will be scoured and disinfected.
- [fol. 22] 3. **STALL PARTITIONS** will be wiped down.
4. **TOILET TISSUE, TOWELS, SOAP, etc.,** will be replaced as needed in proper dispensers from stocks of same items provided by Greyhound Terminal.

**INTERIOR GLASS** will be washed as needed.

**FLOORS, all types, entire building,** will be swept and/or dust mopped.

**TRASH and DEBRIS** will be collected and removed to exterior collection.

**ASH TRAYS, SAND URNS, etc.,** will be emptied and washed, individually.

**CUSPIDORS** will be emptied and cleaned and refilled with water.

**DRINKING FOUNTAINS** will be cleaned, polished and disinfected.

**GLASS DOORS**, all entrances, will be washed.

**HARD SURFACE FLOORING** will be cleaned, as soil occurrence dictates, by mopping, machine scrubbing, etc.

**SEATS** dusted and **SEAT END STANCHIONS** washed.

**DISPATCHER'S OFFICE** AND **RESTROOM** swept and dust mopped three times daily.

**FURNITURE** and **OFFICE EQUIPMENT** dust mopped.

**SIDEWALKS** and **STREET CURBING** adjacent to front and side of building will be swept as needed.

**CONCOURSE PAVEMENT** and **SIDEWALKS** will be swept and debris and trash policed as needed.

**PARKING AREA** will be policed as needed.

[fol. 23] **WEEKLY SERVICES:**

**COMPOSITION FLOOR COVERING** will be cleaned, waxed as needed, polished.

**VENETIAN BLINDS** will be dry dusted.

**WINDOWS**, street level, will be washed, both sides. (No **WASHING** intended for plate glass windows in Restaurant.)

**LIGHT FIXTURES** will be dusted **ONCE MONTHLY**.

**HIGH LEDGES**, **SILLS**, **RAILS**, **PIPES**, **DUCTS**, **STEAM RADIATORS**, **LOUVRES**, etc., will be dusted and/or vacuumed **ONCE MONTHLY**.

**WALLS** will be dry dusted **ONCE MONTHLY**.

**CONCOURSE PAVEMENT** will be scrubbed and scoured **ONCE MONTHLY**, as needed.

**WINDOWS**, **SECOND FLOOR**, **Colored Waiting Area**, will be washed, both sides, **ONCE MONTHLY**. Also windows in offices, **ONCE MONTHLY**.

**MINOR PLUMBING REPAIRS** as needed.

**LIGHT BULBS** and **FLUORESCENT TUBES** will be replaced as needed, from stock provided by Greyhound Terminal.

**SPECIFICS, Cleaning:**

**EMERGENCY CLEANING**, at all times, will be attended per occurrence within normal agreements of this contract.

**DAILY SERVICES**, outlined herein, will be repeated, as needed, for the daily and nightly cleaning best needed for proper results and proper appearances at all times; by discretion of contractor, contractor's supervisory staff and in agreement with The Terminal Management.

**[fol. 24] SPECIAL EXCLUSIONS:**

1. It is not the intention of the contractor to attempt to revitalize painted surfaces, i. e., walls and wood-work, where paint has deteriorated to a large degree. NO WALL WASHING will be accomplished whatsoever where it is found that such cleaning will further damage, thin-out, or in any manner, further depreciate the painted surface:

Normal cleaning will be observed in keeping finger prints, smudges, etc., off DOOR FRAMES, COUNTERS, LEDGES, etc., per soil occurrence.

**PART II**

JANITORIAL AND LOADING SERVICES SCHEDULES FLOORS, INC., as contractor, agrees to furnish supervised labor, in uniform approved by the Terminal Management, in total amounts of man-hours daily to accomplish all the normally practiced services in the Greyhound Bus Terminal, Jacksonville, Florida, as follows:

1. For handling all baggage and express shipments; loading and unloading buses.
2. For checking the level of fuel, oil, water, etc., and replenishing as needed on all pooled buses.
3. For cleaning pooled buses, interior, windshields, rear view mirrors, also windows when needed.
4. For convenience duties.

FLOORS, INC., agrees to furnish not less than the total seven hundred and sixty-five (765) weekly man hours shown in the following schedule of assignments except that schedule revisions including increases or decreases in total weekly man hours may be made from time to time subject to the approval of the Terminal Management.

## [fol. 25] SCHEDULE A

- Days off:
1. 12:30 AM—4:00 AM (lunch) 5:00 AM—10:00 AM Mon.-Tue.
  2. 2:15 AM—7:15 AM (lunch) 8:45 AM—12:15 PM Sat.-Sun.
  3. 6:00 AM—10:30 AM (lunch) 12 noon—4:00 PM Thurs.-Fri.
  4. 6:45 AM—11:00 AM (lunch) 11:30 AM—3:45 PM Tue.-Wed.
  5. 10:00 AM—3:30 PM (lunch) 4:00 PM—7:00 PM Sun.-Mon.
  6. 2:30 PM—7:00 PM (lunch) 8:30 PM—12:30 AM Wed.-Thurs.
  7. 4:45 PM—9:15 PM (lunch) 10:15 PM—2:15 AM Sun.-Mon.
  8. 5:00 PM—9:30 PM (lunch) 10:30 PM—2:30 AM Sat.-Sun.
  9. 9:45 PM—4:15 AM (lunch) 4:45 AM—6:45 AM Tue.-Wed.
  10. Relieves #3 Fri.; #2 Sat.-Sun.; #1 (AM) Mon.-Tue. Wed.-Thurs.
  11. Relieves #8 Sat.-Sun.; #7 Mon.; #9 Tue.-Wed. Thurs.-Fri.
  12. Relieves #7 Sun.; #15 Mon.-Tue.; #6 Wed.-Thurs. Fri.-Sat.
  13. Relieves #5 Sun.-Mon.; #4 Tue.-Wed.; #3 Thurs. Fri.-Sat.
  14. 7:00 AM—3:30 PM daily except Wed. & Thurs. (relief days). Relief Wed. & Thurs. by #15; 8:00 AM—1:00 PM (lunch) 2:00 PM—5:30 PM
  15. 5:00 PM—1:30 AM, daily except Wed. & Thurs. Relieve #14 as shown with schedule #14. Off Mon.-Tues. by #12.



## [fol. 26] SCHEDULE B

1. Monday through Friday 5:00 AM—11:00 AM (lunch) 12 noon—2:30 PM; Saturday 1:00 AM—5:30 AM (lunch) 6:00 AM—10:00 AM; Sunday 6:30 AM—11:00 AM (lunch) 12 noon—4:00 PM.

Days off: Sun.-Mon.

2. Sunday through Thursday: 4:30 PM—9:30 PM (lunch) 10:00 PM—2:00 AM; Friday, 3:00 PM—9:30 PM (lunch) 10:00 PM—12 midnight; Saturday, 8:00 PM—2:30 AM (lunch) 3:00 AM—5:00 AM.

Days off: Thurs.-Fri.

3. Relieves Schedule 1 Sunday-Monday; #2 Thursday-Friday; Saturday only, extra; 10:30 AM—3:30 PM (lunch) 4:00 PM—7:30 PM.

Days off: Tue.-Wed.

It is agreed and understood by both parties to this contract that these Services Schedules are intended to maintain the highest standards of efficiency under existing circumstances at all times. All suggestions and helpful cooperation on the part of FLORIDA GREYHOUND LINES and TERMINAL MANAGEMENT considered by the contractor as obligatory and same shall be reciprocal in the event of additions to or deletions from these Services Schedules.

## EXHIBIT "D-2" TO COMPLAINT

3-3-56

A REVISION OF THE AGREEMENT BETWEEN FLOORS, INC., AND FLORIDA GREYHOUND LINES (Division of The Greyhound Corporation): THE AGREEMENT OF NOVEMBER 11, 1954, WHICH BECAME EFFECTIVE AUGUST 21st, 1955, IS HEREBY ALTERED AND REVISED THIS DATE, MARCH 3, 1956, as follows:

- I. Floors, Inc., as the contractor for all cleaning and porter services in the Jacksonville Greyhound Terminal [fol. 27] (as all were defined in agreement of November 11, 1954), will now perform the identical services with only the following specific alterations in the agreement:

A. The original operating (terminal) schedule of seven hundred and sixty-five (765) work hours, guaranteed by Floors, Inc. is hereby made null and void and it is agreed that Floors, Inc. will furnish seven hundred and twenty-three (723) work hours in fulfillment of said altered schedule as set forth this date by the Terminal Manager of the Jacksonville Greyhound Terminal.

1. The terminal schedule work hours-total of 723 hours consisting of an actual total of 715 work hours to fulfill the terminal schedule and an additional total of 8 work hours above this terminal schedule, which shall be used in terminal cleaning.

B. It is further agreed that the original per annum (fixed) charge of \$53,768.00 is hereby made null and void and that the agreed per annum charge is now made \$56,645.00 for all services agreed to (by agreement of November 11, 1954), all services now being performed (excepting altered work hours totals), and all services agreed to be performed from this date forward.

C. The terminal schedule of 723 hours shall be increased or decreased by direction of the Terminal Manager, only. The alteration of these total hours (715 actual terminal schedule hours, only) shall be at the hourly rate, for decrease or increase, of \$1.506¢ per hour. These added or decreased charges shall apply, weekly, as altered upwards or downwards, to the weekly invoicing to Florida Greyhound Lines by Floors, Inc. for the services rendered.

1. (The hourly rate of \$1.506¢ for increase to, or decrease from, the fixed weekly invoicing price [fol. 28] of \$1,089.38 shall have been obtained by a division of the total per annum fixed agreement price of \$56,645.00 by the per annum total of 37,596 total work hours involved in terminal schedule fulfillment.)

D. All hours of overtime work involved in the proper handling of all porter services to baggage handling

and buses operations, above the guaranteed total of 723 work hours, shall be directed to be used, affected and operated as such by the Jacksonville Greyhound Terminal Manager, only.

1. Such direction to increase the work hours usage, at an overtime rate, based upon the particular worker or workers' hourly rate, over and above the present terminal schedule of 715 work hours, shall be the sole and only authority for Floors, Inc. to charge such directed overtime hours used to Florida Greyhound Lines, over-and-above the regular weekly invoicing of \$1,089.33, at the following agreed rates as applicable:

- (a) All workers employed by Floors, Inc. in the Jacksonville Greyhound Terminal at the hourly rate of \$1.00 per hour shall be paid at the rate of \$1.50 per each overtime hour by Floors, Inc. Each overtime hour used at the rate of \$1.50 per hour shall be charged and invoiced to Florida Greyhound Lines as \$1.75 per each overtime hour, net.
- (b) All workers employed by Floors, Inc. in the Jacksonville Greyhound Terminal at the hourly rate of \$1.25 per hour shall be paid at the rate of \$1.875¢ per each overtime hour by Floors, Inc. Each overtime hour used at the rate of \$1.875¢ per hour shall be charged and invoiced to Florida Greyhound Lines as \$2.10 per each overtime hour, net.

[fol. 29] E. No overtime hours (for holiday traffic increases, emergencies, "rush" and/or "peak" periods), [will be charged] [initialed by JDS and ARA] without authorization of the Jacksonville Greyhound Terminal Manager. The Terminal Manager shall sign, or initial each order for overtime to be used by Floors, Inc. A duplicate copy of each overtime order made up and signed by the Terminal Manager shall be furnished to Florida Greyhound. Each order of authorization by the Terminal Manager for usage of overtime hours by Floors, Inc. shall include the work-

er's name, the worker's base hourly pay rate, the worker's overtime hourly pay rate and the net charge per this overtime hour to Florida Greyhound Lines by Floors, Inc.

- II. These stated alterations, revisions and changes from the original agreement of November 11, 1954, contain and confirm all stipulations and agreements and confirms all understandings thereto in the procedures for handling all services and operations and the procedures for making all charges therein, the original agreement applying fully in all other respects.

FLOORS, INC.

/s/ A. R. Andrews  
Vice President and Sales Manager

FLORIDA GREYHOUND LINES  
(Division of The Greyhound Corporation)

/s/ J. D. Segal  
Comptroller and Assistant Secretary



## [fol. 30] EXHIBIT "D-3" TO COMPLAINT

AN AMENDMENT TO THE ORIGINAL AND REVISED AGREEMENTS, DATED NOVEMBER 11, 1954 AND MARCH 3, 1956, RESPECTIVELY, BETWEEN FLORIDA GREYHOUND LINES (Division of The Greyhound Corporation) AND FLOORS, INC., ENTERED INTO THIS 28th DAY OF SEPTEMBER, 1956, WITH THE FOLLOWING STIPULATIONS AND ALTERATIONS:

- I. For the sole purpose of expanding services in the new Jacksonville Greyhound Bus Terminal.
- II. For alteration of the methods previously used for invoicing and charging all work in the agreements to FLORIDA GREYHOUND LINES by FLOORS, INC.
- III. For the purpose of providing extra cleaning labor over and above the normal daily maintenance program, for the initial heavy clean-up which is expected to be required for good quality appearances in the new terminal building.
- IV. For the purpose of providing proper supervision and additional labor for bus loading as required.

## IT IS AGREED AS FOLLOWS:

## I. Expansion of cleaning services:

- A. To permit FLOORS, INC. to increase its labor totals for expanded cleaning services by a total of 138.0 man hours over and above the present totals of hours presently being used in cleaning. The increase to be paid to workers by FLOORS, INC. at \$1.00 per hour and leaving a net increase, for labor only, as follows:

Per week ..... \$138.00

- B. To permit FLOORS, INC. to increase its supervision over the new expanded cleaning serv-

## [fol. 31]

ices by an addition of one (1) full-time supervisor, as follows:

Per week ..... \$ 85.00

- C. To permit FLOORS, INC. to increase, as a direct result of the increment in basic labor and supervision, the correct accompanying overhead (which is 28% of total cost invoice, over the total of increased labor and supervision) as follows:

Per week ..... \$ 86.72

TOTALS OF ALL INCREASES ..... \$309.72

## II. Alteration of invoicing methods:

- A. It is agreed that FLOORS, INC. will invoice all work contained in the agreements to FLORIDA GREYHOUND LINES under a cost-plus arrangement, as follows:

1. The complete break-down of percentages progressions for arriving at the weekly total of invoice is hereby attached as EXHIBIT "A" and made part of this amendment by signatures of both parties.
2. The maximum guaranteed weekly total invoice charge is hereby stipulated, as follows:

Present total weekly firm price ..... \$1,209.80

Total increased weekly labor etc. .... 309.72

.....  
\$1,519.52

3. The maximum guaranteed weekly invoice charge is hereby made part of this amendment and new method for pricing all total work invoice weekly as: \$1,519.52.

[fol. 32]

## III. Provision of extra cleaning labor (initial cleaning):

- A. To permit FLOORS, INC. to perform extra and special heavy and initial cleaning in the new terminal for work that is expected to be required to achieve the best daily appearances during the

early days of occupancy of the new terminal, it is now agreed that for a period of exactly four (4) weeks, beginning on the first official day of occupancy and the first official day of regular cleaning and bus loading services in the new terminal, that during the first four (4) weeks, and only for this time, an additional charge by FLOORS, INC. in the amount of \$125.00 per week is added to the maximum weekly charge, under the cost-plus method of invoicing all work accomplished.

The first four (4) weeks of work shall be invoiced under the cost-plus method at no more than \$1,644.52, which is the maximum guaranteed price for all bus loading and cleaning services.

#### IV. Special considerations:

- A. Supervision for cleaning: It is recognized by FLOORS, INC. that the addition of one (1) full-time supervisor for cleaning services may not be needed full-time after the first several months of the new terminal occupancy. In such event FLOORS, INC. guarantees that only a pro-rata part of this supervisor's salary wages will be applied to the total of payroll labor-supervision. It further assures FLORIDA GREYHOUND LINES that if a sizeable part of this supervisor's total work week hours are utilized by FLOORS, INC. elsewhere than in the new terminal, that that part of his wages will be charged to FLOORS, INC. only.
- B. It is recognized by both parties that the new terminal is intended towards an attraction of new and added passenger volume to the present volume of business of such nature, now being enjoyed by [fol. 33] the JACKSONVILLE GREYHOUND BUS TERMINAL, in all its facilities for such handling.

It is now agreed that if this expected volume increase occurs to the point of burdening the present bus-loading schedule, by addition of other bus-handling or added baggage handling duties and/or convenience duties, that FLOORS, INC. may be granted the addition of additional man hours,

as authorized by the Terminal Manager in writing, into the overall total of scheduled hours by altering, upwards, all increased and added hours to these schedules, at the rate of \$1.506 per man hour added, same totals to be added to the weekly maximum guaranteed invoice charge.

These stated alterations, revisions and changes from the original agreement of November 11, 1954, and the Revised Agreement dated March 3, 1956, contain and confirm all stipulations and agreements and confirm all understandings in the procedures for handling all services and operations and the procedures for making all charges therein, the original agreement and the revised agreement applying fully in all other respects.

This amendment becomes effective on the first day the services are required at the new terminal.

FLOORS, INC.

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FLORIDA GREYHOUND LINES  
(Division of The Greyhound Corporation)

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[fol. 34]

## EXHIBIT "A"

## I. DEFINED COST-PLUS BREAK-DOWN OF COST-OF-LABOR-PLUS BILLING:

(The following percentages progressions from weekly basic labor totals to net weekly billing constitute the entire, agreed, manner in which all weekly billing will be made and under which method a guaranteed minimum price of \$1644.52 weekly for the first four weeks and \$1519.52 weekly thereafter for all services is affirmed.)

I. All labor and attendant supervision (permanent on-job supervision)	72.0 %	of total cost
II. Obligatory taxes to labor (Federal & State) including insurance on labor wages	5.2 %	of total cost
III. Expendable materials for all nightly cleaning, only	6.3 %	of total cost
IV. Machinery, placement & useage	2.1 %	of total cost
V. Clerical handling all payrolls general supervision, transportation and all equipment other than expendable materials for cleaning, only	8.4 %	of total cost
VI. Gross operating fee	6.0 %	of total cost
Weekly, monthly or per annum total net billing	100.00%	

[fol. 35]

NOTE: Weekly invoicing to include; totals of labor and supervision; names of personnel included and total wages paid, weekly, these workers.

FLOORS, INC.

FLORIDA GREYHOUND LINES  
(Division of The Greyhound Corporation)

President

## EXHIBIT "D-4" TO COMPLAINT

GREYHOUND  
(Trademark)

SOUTHEASTERN GREYHOUND LINES  
*Division of The Greyhound Corporation*  
1352 Vega Street • Jacksonville, Florida

November 13, 1957

Mr. Larry P. Martin, President  
Floors, Inc.  
840 DeKalb Avenue, N. E.  
Atlanta, Georgia

Dear Mr. Martin:

This will confirm our conversation of yesterday on the telephone wherein I requested that your company furnish janitorial and baggage loading service in our Miami Bus Depot. We agreed that you would take over this work at 12:01 AM December 1, 1957.

It was agreed that the contract covering the Miami Depot would be on the same basis as the one we now have on the Jacksonville Depot, which is on a cost-plus basis. We further agreed that you would have one of your representatives meet me in Miami on November 22 to set up the work shifts and that it would be impossible to draw [fol. 36] up a contract until we had worked our work shifts out and know the exact number of employees or man hours that you would have to furnish us. This service is also to include the Miami City Ticket Office and the Miami Beach Terminal.

As outlined in your letter of November 7, this work being done on a cost-plus basis our overall cost would be either raised or lowered by the addition or subtraction of employees, whichever the case might be.

You also state in your letter that you anticipate paying employees an average of \$1.20 per hour and supervisors \$100.00 per week, but in the event you are able to hire employees at \$1.00 per hour and supervisors at less money than the \$100.00 this savings, of course, would

have to be reflected in your weekly statement to us as the whole operation will be based on cost-plus basis.

I am sending you an extra copy of this letter and ask that you please sign on the line provided so that we may have a record in our files that you have insurance covering Workmen's Compensation and liability with a clause showing that Greyhound will be held harmless in the event of any claim arising in connection with your services.

This contract should contain a termination notice by either party for any reason whatsoever on 30 day written notice, the same as the Jacksonville contract.

Very truly yours,

J. W. CABLE, Reg. Mgr.

This is to certify that Greyhound will be fully insured as outlined in the above letter. This insurance will become effective 12:01 AM December 1, 1957.

/s/ Larry P. Martin  
LARRY P. MARTIN,  
Pres. Floors, Inc.

[fol. 37] EXHIBIT "D-5" TO COMPLAINT

January 24, 1958

Mr. Larry P. Martin, President  
Floors, Inc.  
840 DeKalb Avenue, N. E.  
Atlanta, Georgia

Dear Mr. Martin:

This will confirm our conversation of January 15, at which time I asked that you make arrangements to furnish us janitorial and loading service at our Tampa and St. Petersburg Terminals on the same basis that we have with you on our Miami Terminal. This service to become effective 12:01 A.M. February 1, 1958.

If possible, we would like for Southeastern Greyhound Lines to be named as co-insured on the insurance policy covering Tampa and St. Petersburg for liability.

It is agreeable with us for you to separate the payroll for loaders and divide this amount by 82% to obtain the total for that part of our billing.

Very truly yours,

J. W. CABLE  
Regional Manager

JWC:um



**EXHIBIT "E-1" TO COMPLAINT****Order Granting Plaintiff's and Denying Defendant's  
Motion for Summary Judgment, and Summary  
Declaratory Judgment**

(Filed July 27, 1955.)

After due notice to counsel for the affected parties, this cause was heard on plaintiff's motion for summary [fol. 38] judgment (filed February 28, 1955) with affidavit of P. G. Howe attached, and upon defendant's motion for summary judgment (filed March 2, 1955) with affidavit of H. A. Phillips attached, and upon the entire record and file herein; thereafter, briefs and reply briefs were filed by counsel for the respective parties, with leave of Court; the Court has this day filed its Findings of Fact and Conclusions of Law herein;

Whereupon, upon consideration of the foregoing, it is

**ORDERED and ADJUDGED:**

1. The defendant's motion for summary judgment is denied.

2. The plaintiff's motion for summary judgment is granted and judgment is here entered for the plaintiff and against the defendant in accordance with the Findings of Fact and Conclusions of Law this day filed by the Court.

3. The Court thereupon finds and declares the rights and duties of the plaintiffs and defendants under the collective bargaining agreement of August 19, 1953 and in the controversy stated in the plaintiff's complaint and defendant's answer thereto to be as follows:

(a) Said collective bargaining agreement, neither expressly nor impliedly restricts the plaintiff from subcontracting the services covered by its contract of November 11, 1954 with Floors, Inc.

(b) The plaintiff is entitled to enter into and to put into effect said contract with Floors, Inc. of November 11, 1954.

(c) Said contract of November 11, 1954 is not a breach of the collective bargaining agreement between [fol. 39] plaintiff and defendant and the defendant is not entitled to prohibit or interfere with the plaintiff's exercise of its inherent rights of management involved in said contract of November 11, 1954.

DONE AND ORDERED at Jacksonville, Florida, July 27, 1955.

/s/ Bryan Simpson  
United States District Judge.

~~Milam, McHvaine, Carroll & Wattles~~  
~~Coffee & Coffee~~

I certify the foregoing to be a true and correct copy of the original.

JULIAN A. BLAKE,  
Clerk, United States District  
Court, Southern District  
of Florida

By: DAVID A. PELLICER  
Deputy Clerk

(Seal)

**EXHIBIT "E-2" TO COMPLAINT****Findings of Fact and Conclusions of Law.**

(Filed July 27, 1955.)

In support of the order this day filed denying defendant's motion for summary judgment, granting plaintiff's motion for summary judgment and entering summary declaratory judgment, I make the following

**FINDINGS OF FACT.**

1. The plaintiff (hereinafter, the Company) is a corporation incorporated under the laws of the State of Delaware, and is a common carrier by motor vehicles engaged in the transportation of persons for compensation in interstate and intrastate commerce within the State of [fol. 40] Florida and elsewhere, pursuant to authority granted by the Interstate Commerce Commission and The Florida Railroad and Public Utility Commission.

2. The defendant (hereinafter, the Union) is a voluntary unincorporated labor organization and maintains its local offices in the city of Lake City, Florida, and each member of the defendant association is a citizen of a state other than the state of Delaware.

3. On August 19, 1953, the Company and Union entered into a written collective bargaining agreement wherein the Company recognized the Union as a bargaining representative for Company's operators (bus drivers) and terminal employees in various terminals, including Company's terminal employees in the Jacksonville, Florida terminal. Said agreement has been continuously in effect since August 19, 1953, and by its terms shall remain in effect until June 30, 1956, and each year thereafter unless terminated by at least 60 days' written notice by either party to the other prior to the date of initial termination or the date of termination of any annual renewal thereof.

4. On November 11, 1954, the Company entered into a contract with Floors, Inc., a corporation incorporated under the laws of the State of Georgia and authorized to do business in Florida, whereby Floors, Inc., and independent contractor specializing in maid, janitorial and

porter services, agreed to perform certain services in the Company's Jacksonville, Florida terminal, to-wit: cleaning and maintaining rest rooms and generally providing janitorial service for the terminal building, furnishing supervised personnel for handling baggage, express, loading and unloading buses, checking oil, gas and water in buses, cleaning buses and providing other convenience [fol. 41] duties and services. These services have heretofore been performed and are now being performed by Company employees in the Jacksonville terminal, who are members of the Union and represented by it as Bargaining Agent, and (as found in Paragraph 3 above) a class of employees whose wages, hours and working conditions are covered by the collective bargaining agreement of August 19, 1953.

5. Subsequent to the execution of said contract with Floors, Inc., the Company caused to be served upon its said employees engaged in maid, janitorial and porter services, a notice of furlough on account of a reduction in forces effective November 28, 1954, the date Company's contract with Floors, Inc. became effective, whereupon representatives of the Union informed the Company that if its contract with Floors, Inc. was implemented, resulting in the furlough of maids, porters and janitors as aforesaid, the Union would treat the furlough of employees and the subcontracting of work as a breach of the agreement of August 19, 1953, which breach by the Company would justify the Union in treating such breach as a release of it from the "No Strike" provision of the contract and that under such circumstances a strike of the operators and terminal employees would occur, forcing a suspension of the Company's entire motor bus operations.

6. Because of the serious economic consequences to both the Company and its employee members of the Union of such a strike, should it occur, the Company on November 22, 1954 agreed with the duly qualified representative of the Union, H. A. Phillips, its President, that the effective date of furlough and effective date of its contract with Floors, Inc. be temporarily postponed pending an investigation and determination of the legal rights and responsibilities of the parties as fixed by Collective Bar-



[fol. 42] gaining Agreement of August 19, 1953, currently binding on the respective parties.

7. The Company advised the Union that its contract with Floors, Inc. was made under its reserved powers of management and for reasons of efficiency, convenience to the public and economy in operations and that under the contract with Floors, Inc. the Company would achieve an operational savings of \$10,125.44 per year.

8. The Company further advised the Union that the said contract and notice of furlough were made in good faith and in the exercise of the sound principles of management imposed by regulatory agencies as due the traveling public and without intent to harm the Union or to impair its status as Collective Bargaining Agent; the Company further advised the Union that said contract was made pursuant to the Company's inherent rights to manage the affairs of the Company which have not been surrendered by the said agreement of August 19, 1953, and under the law respecting operation of public utilities could not have been surrendered or impaired by that agreement.

9. The Union advised the Company that it deemed the proposed contract with Floors, Inc. in violation of the agreement of August 19, 1953 and that the threat of a general strike against the Company's operation would continue and a strike occur if that contract were activated.

10. The Company's contract with Floors, Inc. was made in good faith and in the exercise of sound principles of management.

11. The Company's contract with Floors, Inc. was made pursuant to the Company's inherent right to manage the affairs of the Company.

[fol. 43] 12. The Company's contract with Floors, Inc. will enable the Company to save \$10,125.44 in operating costs per year.

13. There is no express prohibition in the collective bargaining agreement between the Company and the Union dated August 19, 1953, against the Company subcontracting work of the nature involved in the contract with Floors, Inc.

From the foregoing facts, I make the following

## CONCLUSIONS OF LAW.

1. The Court has jurisdiction.
2. This is a civil action for declaratory judgment.
3. There is no implied prohibition in the collective bargaining agreement between the Company and the Union restricting the Company against subcontracting such services in its terminal operations.
4. The collective bargaining agreement does not deprive the Company of its normal rights of management, and no intention to yield or impair such inherent managerial functions to subcontract that part of its operations involved in the contract with Floors, Inc. can be found in the collective bargaining agreement, nor implied therefrom.
5. The action of the Company in serving the notice of furlough dated November 21, 1954 was in keeping with the requirements of the collective bargaining agreement.
6. The Company has not breached its collective bargaining agreement with the Union.
7. The Company is entitled to consummate immediately (after serving another notice of furlough) its contract with Floors, Inc. dated November 11, 1954.
- [fol. 44] 8. The Union is not entitled to prohibit or interfere with the Company's exercise of its inherent rights to manage its business affairs as set forth herein.
9. The services to be performed under subcontracting with a third party may or may not be an integral part of the very subject matter of the collective bargaining agreement but there is no express or implied prohibition against the Company subcontracting this part of its operations.
10. The plaintiff's motion for summary judgment will be granted in conformity with the above expressed findings and defendant's motion for summary judgment will be denied, and summary declaratory judgment entered in accordance herewith.

/s/ Bryan Simpson  
United States District Judge

Jacksonville, Florida

July 27, 1955

Milam, McIlvaine, Carroll & Wattles  
Coffee & Coffee

I certify the foregoing to be a true and correct copy  
of the original.

JULIAN A. BLAKE,  
Clerk, United States District  
Court, Southern District  
of Florida

By /s/ David A. Pellicer  
Deputy Clerk

(Seal)

[fol. 45]

**IN UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA**

**AFFIDAVIT OF ALEXANDER E. WILSON, JR.—  
Filed May 24, 1962.**

STATE OF GEORGIA )

COUNTY OF FULTON )

Personally appeared before the undersigned officer authorized by law to administer oaths, **ALEXANDER E. WILSON, JR.**, who first being duly sworn, deposes and says as follows:

My name is Alexander E. Wilson, Jr., and I am an attorney at law, with offices in the Rhodes-Haverty Building, in Atlanta, Georgia.

I am attorney for Floors, Inc., of Florida, which is a Florida corporation, and a wholly owned subsidiary of Floors, Inc., a Georgia corporation, headquartered in Atlanta, Georgia. I am also Secretary and a member of the Board of Directors of both corporations. Floors, Inc., of Florida is one of the parties to National Labor Relations Board Case No. 12-RC-1209, referred to in the Complaint in the above stated cause. Floors, Inc., of Florida will hereinafter be referred to as "Floors".

Floors is engaged in the business of furnishing clean up, building maintenance, and other allied services, and furnishes such services to varied customers throughout Florida, including The Greyhound Corporation.

Floors employed a total of 384 persons in the State of Florida at the time of the hearing in the above referred to National Labor Relations Board case, Floors now employs substantially in excess of 500 employees in the State of Florida. Only 63 Floors employees work part or full time at Greyhound bus terminals in Florida. 26 Floors employees are based in Tampa, of whom 12 are employed [fol. 46] full or part time at the Tampa Greyhound terminal and 6 at the St. Petersburg Greyhound terminal. Floors employs 17 persons who work at the Miami Grey-



hound terminal, and 28 who work at the Jacksonville Greyhound terminal.

Floors contracts to perform services for its customers for a fixed price, the price usually being determined on a cost-plus basis, and agrees to provide to customers a certain number of man hours of work per week to perform the work contracted for by the customers. A Floors supervisor is then instructed by Floors to supervise the work of such employees.

I have been attorney for Floors, Inc., the Georgia corporation, since 1950, and have been attorney for Floors, Inc., of Florida, since its inception, and thus know all of the matters referred to in this affidavit.

With reference to all of the employees of Floors, Inc., of Florida, only Floors has the right to hire, discharge and discipline such employees. This is specifically true with reference to the Floors employees assigned to work at the Greyhound terminals at Jacksonville, Tampa, St. Petersburg and Miami, Florida. Floors trains all of its employees for the particular work to which they are assigned, and Floors makes the assignment of such employees as it sees fit. If a customer of Floors requests Floors to remove an employee from Greyhound's premises, and a good reason is shown therefor, Floors would normally remove such employee from such premises but would have no responsibility to the customer whatsoever to discharge such employee.

The wages of Floors employees assigned to work at Greyhound terminals are paid by Floors, the pay checks being made up at Floors main office in Atlanta and distributed to the employees through Floors supervisors. Floors determines what to pay its employees and the only [fol. 47] interest which customers of Floors have as to such wages is the fact that most Floors contracts are on a cost-plus basis. Typical of this situation is the fact that all janitors and maids employed by Floors in the Tampa area, working on the premises of various Floors customers, including Greyhound, receive the same wage rate. Floors has the right to fix fringe benefits for its employees and to establish and maintain working conditions for its employees. Greyhound representatives do not supervise or instruct Floors employees on the job,

except in extremely rare instances where emergencies may necessitate such instruction. Any complaints that Greyhound may have as to the work of any of Floors employees must be made to Floors supervisors and not to the employees. Floors is the sole supervisor of the day to day activities of its employees assigned to work on Greyhound premises.

Floors also determines the hours of work of its employees. Floors also at any time may transfer an employee from work being performed for one customer of Floors to work being performed for another customer of Floors. Floors provides a highly specialized service to its customers and retains the right to rotate its employees and to interchange its employees among customers as it sees fit, in order to give all customers the most skilled and efficient result obtainable. Floors exercises this right of rotation.

Floors handles withholding taxes of its employees; Floors controls fringe benefits and pays workmens' compensation, unemployment compensation and social security on its employees; Floors provides supervision of the day to day activities of its employees; Floors owns and furnishes all supplies and equipment used by its employees; Floors determines the hours of work of its employees; and Floors retains and exercises the right to use its employees on whatever job it desires at any time.

[fol. 48] The petitioning Union in National Labor Relations Board case No. 12-RC-1200 is seeking to represent only those employees of Floors who are employed at the four Greyhound terminals located at Jacksonville, Miami, Tampa and St. Petersburg, Florida. Such employees constitute substantially less than one-sixth (1/6) of Floors employees employed in those four areas.

The Greyhound Corporation is in no way the employer or co-employer of Floors employees.

/s/ Alexander E. Wilson, Jr.

SWORN TO AND SUBSCRIBED before me this 21st day of May, 1962.

/s/ Gladys I. Plembeck

Notary Public, Fulton County,  
Georgia.

(Seal)

My Commission Expires February 10, 1963.

IN UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA

AFFIDAVIT OF J. W. CABLE—Filed May 24, 1962.

STATE OF FLORIDA )

COUNTY OF HILLSEBOROUGH )

Personally appeared before the undersigned officer authorized by law to administer oaths, J. W. CABLE, who first being duly sworn, deposes and says as follows:

My name is J. W. Cable, and I am Regional Manager of Southern Greyhound Lines for the State of Florida, with offices in Jacksonville, Florida. Southern Greyhound Lines is an operating division of The Greyhound Corporation, a corporation organized and existing under and by virtue of the laws of the State of Delaware. The Greyhound Corporation operates passenger buses and terminals, and my duties constitute direct responsibility for the operation of the lines and the terminals in the State of Florida, including those terminals located at Jacksonville, Miami, Tampa and St. Petersburg, Florida.

A few days after May 3, 1962, The Greyhound Corporation (Southern Greyhound Lines Division), hereinafter referred to as the plaintiff, received a copy of the Decision and Direction of Election in National Labor Relations Board case No. 12-RC-1209, a true and exact copy of which is attached to the Complaint in the above stated cause as Exhibit "A". Shortly after May 11, 1962, the plaintiff received a copy of a letter referring to said National Labor Relations Board case No. 12-RC-1209, addressed to Alexander E. Wilson, Jr., Esquire, 615 Rhodes-Haverty Building, Atlanta, Georgia, an exact copy of which is attached to the Complaint in the above stated cause as Exhibit "B".

One or more days subsequent to May 17, 1962, Greyhound received a letter addressed to one of its attorneys from the office of the Twelfth Region, National Labor Relations Board, Tampa, Florida, dated May 17, 1962, a true and correct copy of which letter is attached to the Complaint in this cause as Exhibit "C".

On November 11, 1954, the predecessor to the plaintiff, Florida Greyhound Lines (Division of The Greyhound

Corporation), entered into an agreement with Floors, Inc., (hereinafter referred to as Floors), whereby Floors was to perform certain janitorial and loading services at the Greyhound bus terminal in Jacksonville, Florida, which said contract was altered and revised by a revision dated March 3, 1956, and a later revision dated September 28, 1956, an exact copy of said contract and said revisions being attached to the Complaint in the above-stated cause as Exhibits "D-1", "D-2" and "D-3".

[fol. 50] By letter dated November 13, 1957, the plaintiff and Floors entered into a like agreement covering the Miami Greyhound terminal, and by oral agreement of January 15, 1958, confirmed by letter of January 24, 1958, an agreement was entered into between the plaintiff and Floors, covering the Tampa and St. Petersburg Greyhound terminals. True and exact copies of the last referred to letters are attached to the Complaint in the above styled cause, respectively, as Exhibits "D-4" and "D-5".

The agreements between plaintiff and Floors were interpreted and mutually applied by the parties thereto as creating Floors as an independent contractor, and it was mutually understood and agreed that the plaintiff would have no authority whatsoever over the employees of Floors. To my knowledge, only a small number of the employees of Floors in Florida are employed by Floors for services at the plaintiff's terminals, Floors having numerous contracts with other businesses, such as office buildings and airports, for example.

Throughout the life of the contracts at Jacksonville, Miami, Tampa and St. Petersburg Greyhound terminals, the supervisors of Floors have supervised the employees of that corporation who have worked at said terminals, the employees being porters, janitors, and maids, and the employees and supervisors of the plaintiff have had no authority to direct, control or discipline the employees of Floors.

The said employees of Floors are paid by Floors, and only Floors has authority to promote and demote said employees. Floors hires, fires and selects its own employees and assigns them to work at such location as Floors may determine; Floors determines the number of hours worked during the day by each of its employees; with respect



to such employees, Floors keeps payroll records, disciplines, furnishes supplies and working equipment, pays [fol. 51] workmen's compensation, pays social security tax, pays unemployment compensation, withholds for Federal income tax purposes, determines vacations and holidays, and grants leaves of absence. Floors employee interchanges as to work or duties with any employee of the plaintiff. Floors maintains a supervisor of its employees in Jacksonville, a supervisor in Tampa who has charge of both Tampa and St. Petersburg, and a supervisor of its employees at Miami. These supervisors are paid solely by Floors and report solely to Floors. Any complaints which the plaintiff has with regard to the performance of work by any of the employees of Floors are made directly to the supervisors employed by Floors.

I have directed the terminal managers in my region that they were not to supervise or attempt to supervise the employees of Floors, that they were not to give instructions to the employees of Floors, and that all complaints about the work of the employees of Floors were to be directed to and handled by the supervisors of Floors. Every terminal manager and every supervisory employee of Greyhound at the terminals in Jacksonville, Miami, Tampa, and St. Petersburg, has repeatedly received such instructions.

The plaintiff is a party to a collective bargaining agreement with certain divisions of Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO, which covers only the employees of plaintiff and not any of the employees of Floors.

I have read the allegations in the Complaint in this cause, and the same are true and correct.

This affidavit is given for the purpose of being used in support of the relief sought by the plaintiff in said Complaint.

/s/ J. W. Cable

[fol. 52] SWORN TO AND SUBSCRIBED before me this 23 day of May, 1962.

/s/ Agnes D. Nores  
Notary Public, State of Florida  
at Large

(Seal)

My commission expires: December 5, 1965.

IN UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA

TEMPORARY RESTRAINING ORDER AND ORDER SETTING  
HEARING FOR PRELIMINARY INJUNCTION—  
May 24, 1962.

The Complaint in the above styled cause having been presented to the Court by an attorney for the plaintiff, ex parte and without notice to the defendant, and said Complaint having been duly considered, together with the affidavits in support thereof, and it clearly appearing from the specific facts shown by the affidavits, one of which verifies the Complaint, that immediate and irreparable injury, loss or damage will result to the plaintiff before notice can be served and a hearing had thereon, and the Court finding that the plaintiff will suffer irreparable injury unless a temporary restraining order be granted, such irreparable injury being the deprivation of rights granted to plaintiff by the Labor Management Relations Act, 1947, as amended, that is to say, the right not to be held to be an employer jointly and together with an independent contractor with respect to the employees of said independent contractor in a representation proceeding under said Act, and that the injury suffered will further be irreparable because plaintiff has no other adequate remedy at law, all as set forth in the Complaint herein, and the Court further finding that this temporary restraining order should be and is granted without notice to the defendant, because the defendant, unless so re-[fol. 53] strained, proposes to hold the representation election hereinafter referred to within such a short period of time that notice is not feasible, the defendant now planning and putting into operation a plan to hold the said representation election on May 28 or May 29, 1962, and to take steps preliminary thereto, the said proposed representation election arising out of the Decision and Direction of the National Labor Relations Board in that Board's case No. 12-RC-1209, wherein the petitioner is Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO, it is hereby

**ORDERED, ADJUDGED AND DECREED as follows:**

1. Pending hearing upon plaintiff's prayer for preliminary injunction, as hereinafter provided, the defendant, Harold A. Boire, as Regional Director of the Twelfth Region, National Labor Relations Board, his successors or designees, and all persons acting in his stead or under his direction or control, be and they hereby are temporarily restrained from conducting or causing to be conducted a representation election of all porters, janitors and maids working at The Greyhound Corporation's bus terminals in Miami, St. Petersburg, Tampa and Jacksonville, Florida, pursuant to the Decision and Direction of Election of the National Labor Relations Board in that Board's case No. 12-RC-1209, issued May 3, 1962, wherein The Greyhound Corporation (Southern Greyhound Lines Division) and Floors, Inc., of Florida are alleged to be the employer and Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO, are alleged to be the petitioner.

2. This temporary restraining order shall become effective upon the giving of security by the plaintiff in the sum of \$1,000.00 for the payment of such costs and damages as may be incurred or suffered by any person who is found to have been wrongfully restrained by this order, such security to be approved by the Clerk of this Court.

3. This temporary restraining order shall expire 10 days from and after the date of the entry of this order, unless within such time and for good cause shown the same be extended for an additional such period.

4. That plaintiff's prayer for a temporary injunction is hereby treated and deemed to be a motion for preliminary injunction, and the same will come on for hearing before this Court in Chambers, in the Federal Building, Tampa, Florida, at 9:30 o'clock a.m., on the 4th day of June, 1962.

DONE AND ORDERED in Chambers, at Tampa, Florida,  
this 24th day of May, 1962.

/s/ Joseph P. Lieb  
United States District Judge

[Bond on appeal for \$1,000.00 approved and  
filed May 24, 1962 omitted in printing]

[fols. 55-56] \* \* \*

[fol. 57]

*[Duly sworn to by Carroll R. Young  
jurat omitted in printing]  
(all in italics)*

[fol. 58]

IN UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA.

CERTIFICATE OF SERVICE OF AFFIDAVITS—  
Filed May 29, 1962.

This will certify that I have served a copy of the Affidavit of J. W. Cable and a copy of the Affidavit of Alexander E. Wilson, Jr., the originals of which have heretofore been filed in the above stated cause; upon the defendant, by mailing said copies by United States mail, postage prepaid, to Martin Sacks, Esquire, Regional Attorney, Twelfth Region, National Labor Relations Board, Ross Building, 112 East Cass Street, Tampa 2, Florida, this 28th day of May, 1962.

THIS CAUSE came on to be heard upon the oral motion to extend the temporary restraining order heretofore issued by this Court on the 24th day of May, 1962. The Court heard argument of counsel for the respective parties; and it appearing to the Court that the temporary restraining order heretofore issued on the 24th day of [fol. 59] May, 1962, is to expire on this date; and at the time of the oral argument the counsel for the respondent



furnished the Court with authorities and an extensive brief in support of the position of the respondent, and the counsel for the petitioner also submitted further legal briefs in support of its position, and inasmuch as the Court is currently engaged in trying civil jury cases and would not be in a position to consider the matter involved in this cause prior to the expiration date heretofore set; and it further appearing to the Court's satisfaction that the maintenance of the status quo in this cause is well justified and highly desirable; it is, therefore, upon consideration,

**ORDERED, ADJUDGED and DECREED:**

That the oral motion to extend the temporary restraining order issued by this Court on the 24th day of May, 1962, be, and the same is hereby, granted, and the temporary restraining order be, and the same is hereby, extended until the 14th day of June, 1962. It is further

/s/ Warren E. Hall, Jr.  
Attorney

**IN UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA**

**ORDER EXTENDING TEMPORARY RESTRAINING ORDER—  
June 4, 1962**

**ORDERED, ADJUDGED and DECREED:**

That the bond heretofore posted by the petitioner, The Greyhound Corporation, in compliance with Rule 65 of the Federal Rules of Civil Procedure, shall remain in full force and effect until the expiration of this extended period of time, to-wit, June 14, 1962.

[fol. 60] **DONE and ORDERED** at Tampa, Florida, this 4th day of June, 1962.

/s/ Joseph P. Lieb,  
Judge of United States District  
Court.

IN UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA

FINAL DECREE FOR PERMANENT INJUNCTION AND  
MEMORANDUM OPINION—June 11, 1962

LIEB, District Judge

THIS CAUSE came on to be heard upon the plaintiff's Prayer for Preliminary Injunction, said hearing having been provided in the Court's Temporary Restraining Order and Order Setting Hearing for Preliminary Injunction entered May 24, 1962. Prior to the hearing, the defendant filed a Motion to Dismiss and, in the alternative, a Motion for Summary Judgment. Plaintiff presented its Complaint and exhibits attached thereto, together with an affidavit of an officer of Floors, Inc., of Florida, and an affidavit of the regional manager of plaintiff, the latter affidavit, in part, swearing to the allegations of the complaint. No affidavits were presented on behalf of the defendant nor were any sworn pleadings filed on behalf of said defendant.

After considering the matters hereinabove referred to and hearing argument of counsel for the respective parties, the Court is of the opinion that there are no material issues of fact, and the issues of law as resolved herein make it unnecessary and undesirable for the Court to issue a temporary injunction but that a permanent injunction is warranted by the findings hereinafter set forth.

[fol. 61] The plaintiff contends that a Decision and Direction of Election of the National Labor Relations Board in that Board's case No. 12-RC-1209, issuing certain directions to the defendant herein, is contrary to the express provisions of the National Labor Relations Act, as amended, and is beyond the statutory powers vested in the National Labor Relations Board. This contention is predicated upon the fact that in said Decision and Direction of Election, the Board found that a corporate entity other than plaintiff, viz., Floors, Inc., of Florida, hires, pays, disciplines, transfers, promotes and discharges the porters, janitors and maids who are alleged to constitute an appropriate unit for the purposes of col-

lective bargaining; but nevertheless also found that the said Floors, Inc., and the plaintiff, were joint employers of the employees in the said unit. The findings of the Board, allegedly in support of a joint employer relationship, are that the plaintiff's terminal managers confer with Floors' supervisors in setting up work schedules and in determining the number of employees required to meet those schedules; that Floors' supervisors may visit the plaintiff's terminals on an irregular basis, and on occasion may not appear for as much as two days at a time; that the employees receive work instructions from plaintiff's terminal officials; and that on one occasion the plaintiff prompted the discharge of a porter whom it felt to be an unsatisfactory employee. The Court is of the opinion that the findings of the Board, as recited, are, as a matter of law, insufficient to create a joint employer relationship with respect to the employees in said unit; but that, on the contrary, said findings establish as a matter of law that Floors, Inc., is an independent contractor and, for the purposes of collective bargaining, its employees are not the employees of the plaintiff. The Court is therefore of the opinion and finds that with regard to representation proceedings the Board is prohibited [fol. 62] by the provisions of the National Labor Relations Act, as amended, from conducting a representation election wherein the plaintiff is a party-employer with regard to persons who, under the Act, are not its employees. The Court finds that Section 9 of the Act expressly contemplates representation proceedings only as regards the employer of the employees comprising the unit found to be appropriate by the Board. The Court further finds that by virtue of Section 2(3) of the Act, any individual having the status of an independent contractor is expressly excluded from the term "employee", as defined in that Act. As a matter of law, the employees of an independent contractor do not stand in the relationship of employer-employee with regard to the principal who employs the independent contractor for the purpose of Section 9 of the Act, unless the facts involve an alter ego situation, that is where one employer is in fact the alter ego of another employer, which is clearly not the case in this instance. To follow a contrary interpretation of the

Act would be patently absurd. One can readily see that the prime object of the compulsory bargaining feature of the Act is to bargain on wages and working conditions. It is impossible to comprehend how an employer could bargain in good faith about wages with employees who are not paid by said employer and over whom the said employer cannot exercise the power of hiring or firing.

The Court further finds that this case is controlled by the decision of the Supreme Court of the United States in *Leedom v. Kyne* (1958), 358 U.S. 184, 3 L.Ed.2d 210, 79 Sup. Ct. 180, and that this Court has jurisdiction of the action under Section 24(8) of the Judicial Code, 28 U.S.C.A., § 1337, because the action arises under an Act of Congress regulating commerce. The Court further finds that in its said Decision and Direction of Election the [fol. 63] Board has attempted to act in excess of its delegated power, particularly in view of the legislative history of the portion of the Taft-Hartley Act of 1947 which amended the definition of the word "employee" so as to expressly exclude "independent contractors".

In further support of the Court's finding that there is no employer-employee relationship; as between the persons described in the unit and the plaintiff, are affidavits which are not challenged by counter-affidavits in this case, demonstrating conclusively that, with respect to the said employees, Floors, Inc., and only Floors, Inc., pays social security taxes and unemployment compensation insurance, withholds Federal income taxes, determines rates of pay and hours of employment, provides day to day supervision, furnishes all supplies and equipment used by its employees, and retains and exercises the right to use its employees on whatever job it desires; and that the employees in the purported unit constitute only a relative few of Floors' employees in the areas involved, such other employees being engaged in activities wholly unrelated to the plaintiff.

The defendant's contention is that this Court is without jurisdiction of the subject matter, first, because the subject matter is exclusively within the competence and jurisdiction of the Board by virtue of the National Labor Relations Act, and as amended by the Taft-Hartley Act, and second, even if this Court is not deprived of jurisdic-



tion because of the Acts cited above, it lacks equity jurisdiction because of the availability of other adequate remedies which exist before the Board and before the Court of Appeals through the enforcement proceedings provided for in the Act.

With regard to the first contention, it is the opinion of the Court that the subject matter involved in this litigation [fol. 64] is not the subject matter which is within the exclusive jurisdiction and competence of the Board, and the matter involved in this cause does not involve a review of an erroneous decision of the Board but rather involves an attack on the action taken by the Board which it was not authorized to take under the statute. Representation orders of the Board have not been vested with complete immunity from injunction, either by inferences from the National Labor Relations Act or on the principle of *Myers v. Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938). (See *Empresa Hondurena de Vapores, S.A., v. Ivan C. McLeod, Regional Director, etc.*, (2 Cir. 1962), 300 F.2d 222.) Whether or not this Court is authorized to intervene in a representation proceeding depends ultimately on the facts presented to it; and if it appears that the Board exceeded its delegated powers, either by acting contrary to a mandatory prohibition of the Act (see *Leedom v. Kyne*, supra) or by acting clearly contrary to the over-all spirit of the Act and the manifested intention of Congress (see *Empresa Hondurena de Vapores v. McLeod*, supra), then this Court cannot fail to exercise its equity powers to prevent a wrong.

With regard to the second contention that this Court lacks equity jurisdiction because of the availability of other remedies, it is the opinion of the Court that this contention is equally without merit. The method allegedly open to the plaintiff to contest the Board's decision is as follows: The plaintiff can refuse to bargain with the Union involved in this case when it is certified; and thereby plaintiff is open to an unfair labor practice charge. (29 U.S.C. § 158(a)(5).) As an incident to the hearing of such charge by the Board, and upon review by a United States Court of Appeals, the certification of the Union can be inquired into. (29 U.S.C. § 159(d), 160.) The de-

[fol. 65] defendant further contends in this respect that even under *Leedom v. Kyne*, supra, it is only the Union that is entitled to invoke the equity jurisdiction of Federal District Courts.

The defendant's contention that the alleged availability of this method of review bars the plaintiff from seeking relief from this Court does not bear close analysis. First, it presupposes that, upon the plaintiff's refusal to bargain in good faith, the Union will file an unfair labor charge. Second, it presupposes that, upon the filing of such an unfair labor charge by the Union, the Board will institute an enforcement proceeding. These presuppositions are patently without foundation. The likelihood that the Union will resort to the use of the powerful weapon of picketing, and thereby tie up with a handful of pickets the entire transportation system of the plaintiff, is far greater and more real than the likelihood that the Union will resort to filing an unfair labor charge with the Board.

Assuming, but not admitting, that the Union will file an unfair labor charge upon the plaintiff's refusal to bargain, the determination of the unfair labor charge by the Board, and the enforcement proceeding, are known to be prolonged and very time-consuming; and picketing of the plaintiff by the Union while the case is being decided by the Court of Appeals could mean complete economic ruin to the plaintiff. Even if the plaintiff would ultimately prevail, its victory would, indeed, be a pyrrhic one. In the light of the foregoing, one is compelled to conclude that the said method of review, allegedly available to the plaintiff, is not an adequate remedy.

With regard to the contention that under *Leedom v. Kyne*, supra, only the Union can invoke the equity jurisdiction of the District Court, it is the opinion of the Court that nothing in the *Leedom* case indicates the proposition urged here by the defendant. This contention was rejected by the Court in *Worthington Pump and Machinery Corporation v. Douds, et al.*, (1951, D.C.N.Y.), 97 F. Supp. 656, and this Court is in full agreement with the principles expressed in said case.

The defendant also contends that the Court lacks jurisdiction of the members of the National Labor Relations Board who are indispensable parties to this action. This

contention is likewise without merit because the relief sought may be effectively granted against the defendant Regional Director (see *Empresa Hondurena de Vapores v. McLeod*, supra; *Williams v. Fanning* (1947), 332 U.S. 490, 92 L. Ed. 95; and *Bradley Lumber Co., etc., et al. v. National Labor Relations Board* (5 Cir. 1936), 84 F.2d 97).

The defendant also contends that the action is premature. This is merely another way of saying that the plaintiff must exhaust administration remedies provided with regard to unfair labor practice cases, as set forth in the National Labor Relations Act, as amended. This contention is likewise without merit for the same reasons assigned hereinabove with regard to the contention that the Court is without jurisdiction of the subject matter of this action.

Finally the defendant contends that the Complaint fails to state a claim warranting relief. The Court finds this contention likewise to be without merit for the same reasons hereinabove assigned with regard to the contention that the Court is without jurisdiction of the subject matter and the contention that the action is premature. For the reasons hereinabove assigned, the defendant's Motion to Dismiss will be denied.

Defendant moves, in the alternative, that a Summary Judgment be entered in his favor on the basis of the [fol. 67] Complaint, and exhibits attached thereto, and the Motion, and exhibits attached thereto. The exhibits attached to the Complaint consist of the Decision and Direction of Election, which is the subject matter of the Complaint, together with letters from the assistant to the Regional Director, defendant herein, advising plaintiff of the immediacy of the proposed election, copies of agreements between the plaintiff and Floors, Inc., with respect to the services involved herein, and a certified copy of an order of the United States District Court of the Southern District of Florida, Jacksonville Division, in an action between plaintiff and the petitioning Union in the instant case, wherein the Honorable Bryan Simpson, United States District Judge, found the contract between the plaintiff and Floors, Inc., to constitute an independent contractor relationship.

The exhibits to the Motion of the defendant are comprised of a Petition to the National Labor Relations Board, dated April 17, 1961, wherein the employees in the unit proposed by the National Labor Relations Board in this case petition for a representation election with regard to their employer, Floors, Inc.; an Amended Petition dated May 25, 1961, naming Southeastern Greyhound Lines and Floors, Inc., as the "employers"; a copy of the Decision and Direction of Election, which is also attached as an exhibit to the Complaint; a copy of an Order dated May 25, 1962, denying a Motion for Reconsideration in case No. 12-RC-1209, filed by Floors, Inc.; and a Memorandum in Support of Defendant's Motion to Dismiss the Complaint and for Summary Judgment. The Memorandum in Support of the Motions will not be construed as evidence in the case but merely as a legal memorandum or brief of the defendant.

[fol. 03] The plaintiff filed with the Court, and served upon the defendant, an affidavit of the secretary of Floors, Inc., of Florida, setting forth in detail all of the elements which constitute Floors, Inc., as the sole employer of the employees in the proposed unit. The plaintiff also filed and served upon the defendant the affidavit of J. W. Cable, Regional Manager of the plaintiff for the territory covering the State of Florida, identifying under oath the various attachments to the Complaint, swearing to the allegations of the Complaint, and setting forth in substantial detail the relationship between the plaintiff and Floors, Inc., demonstrating a pure independent contractor relationship.

Inasmuch as the Motion for Summary Judgment of the defendant raises no issue of fact, and inasmuch as said Motion for Summary Judgment does not refute the allegations of the Complaint or of the affidavits in support thereof, but relies upon the same contentions of law hereinabove referred to with regard to the Motion to Dismiss, and said contentions being found by the Court to be without merit, the said Motion for Summary Judgment will likewise be denied.

The Court finds that the plaintiff has a statutory right not to be held to be an employer jointly and together with an independent contractor with respect to the employees



of said independent contractor in a representative proceeding under the Act, and that the violation of the Act on the part of the National Labor Relations Board and the deprivation of said right of the plaintiff will cause the plaintiff to suffer irreparable injury unless the injunction prayed for be granted. The Court finds that the plaintiff has no adequate remedy at law. It is therefore, upon consideration,

**ORDERED, ADJUDGED and DECREED:**

1. That the defendant, Harold A. Boire, as Regional Director of the Twelfth Region, National Labor Relations [fol. 69] Board, his successors or designees, and all persons acting in his stead or under his direction or control be, and they are hereby, permanently enjoined from conducting, or causing to be conducted, a representation election of all porters, janitors and maids working at The Greyhound Corporation's bus terminals in Miami, St. Petersburg, Tampa and Jacksonville, Florida, pursuant to the Decision and Direction of Election of the National Labor Relations Board in that Board's case No. 12-RC-1209, issued May 3, 1962, wherein the Greyhound Corporation (Southern Greyhound Lines Division) and Floors, Inc., of Florida, are alleged to be the employer, and Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO, is alleged to be the petitioner.

2. That defendant's Motion to Dismiss be, and the same is hereby, denied.

3. That defendant's Motion for Summary Judgment be, and the same is hereby, denied.

4. That the defendant was not wrongfully restrained by the Temporary Restraining Order heretofore issued in this case and, therefore, that the bond given by the plaintiff as security required by Rule 65 of the Federal Rules of Civil Procedure may be dissolved and no other or further security need be given by the plaintiff in this cause.

DONE and ORDERED at Tampa, Florida, this 11th day of June, 1962.

/s/ Joseph P. Lieb,  
United States District Judge

[fol. 70]

**IN UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA**

**DEPENDANT'S NOTICE OF APPEAL—Filed June 18, 1962.**

Notice is hereby given that Harold A. Boire, Regional Director, Twelfth Region, National Labor Relations Board, defendant above named, appeals to the United States Court of Appeals for the Fifth Circuit from the final Order of this Court, in the above-entitled case, permanently enjoining any further proceedings in Case No. 12-RC-1209 on the docket of the National Labor Relations Board, which Order was entered on June 11, 1962.

/s/ Marcel Mallet-Prevost  
Assistant General Counsel  
National Labor Relations Board  
Washington 25, D. C.

and

Martin Sacks  
Regional Attorney  
12th Region, NLRB  
Ross Building,  
112 Cass Street  
Tampa, Florida

Dated at Washington, D. C., this 15th day of June,  
1962.

IN UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA

DEFENDANT'S DESIGNATION OF RECORD ON APPEAL  
—Filed June 18, 1962.

The defendant hereby designates for the purposes of appeal the entire record including briefs, memoranda, etc., in the above entitled case and respectfully requests [fol. 71] that the record be transmitted forthwith to the Clerk of the Court of Appeals for the Fifth Circuit.

/s/ Marcel Mallet-Prevost  
Assistant General Counsel  
National Labor Relations Board  
Washington 25, D. C.

and

Martin Sacks,  
Regional Attorney  
12th Region, NLRB  
Ross Building  
112 Cass Street  
Tampa, Florida

Dated at Washington, D. C., this 15th day of June,  
1962.

[Certificate of Service omitted in printing]

[fol. 72]

IN UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA

## DOCKET ENTRIES

## DATE

## PROCEEDINGS

1962

- May 23 Complaint filed.  
May 24 Affidavit of Alexander E. Wilson, Jr.  
24 Affidavit of J. W. Cable.  
24 Temporary Restraining Order and Order Setting  
Hearing for Preliminary Injunction.  
24 Pltfs. Bond in the sum of \$1,000.00 filed.  
29 Plaintiff's Certificate of Service, of copies of  
Affidavits.  
June 5 Order that Temporary Restraining Order is Ex-  
tended until June 14, 1962; Bond heretofore  
posted by petitioner shall remain in full force  
and effect until the expiration of June 14, 1962  
(furnished copies mailed attys.)  
12 Final Decree for Permanent Injunction and  
Memorandum Opinion (furnished copies mailed  
attys.)  
18 Defendant's Notice of Appeal.  
18 Defendant's Designation of Record on Appeal.  
18 Defendant's Certificate of Service.

I certify the foregoing to be a true and correct copy of  
the original.

JULIAN A. BLAKE,  
Clerk, United States District  
Court, Southern District of  
Florida

By: /s/ Betty Hansen  
Deputy Clerk



[fol. 72a]

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
TAMPA DIVISION**

**Case No. 4414-Civ.-T**

**THE GREYHOUND CORPORATION, a Delaware Corporation,  
PLAINTIFF**

**v.**

**HAROLD A. BOIRE, as Regional Director, Twelfth Region,  
National Labor Relations Board, DEFENDANT**

**[File Endorsement Omitted]**

**MOTION OF DEFENDANT REGIONAL DIRECTOR TO DISMISS  
COMPLAINT, OR, IN THE ALTERNATIVE, FOR SUMMARY  
JUDGMENT IN HIS FAVOR—Filed June 4, 1962**

**1. Defendant, by his attorneys, moves that the complaint herein be dismissed because:**

**(a) This Court is without jurisdiction of the subject matter of the action;**

**(b) This Court lacks jurisdiction over the members of the National Labor Relations Board, who are indispensable parties to the action;**

**(c) The action is premature;**

**(d) The complaint fails to state a claim warranting relief.**

**2. In the alternative, defendant moves that summary judgment be entered in his favor, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the basis of the Complaint, attached exhibits, and this motion and exhibits attached thereto.**

64  
WHEREFORE, it is respectfully requested that the complaint be dismissed or, in the alternative, that summary judgment be entered in defendant's favor.

Dated at Washington, D. C., this 29th day of May, 1962.

/s/ Marcel Mallet-Prevost  
Assistant General Counsel  
National Labor Relations Board  
Washington 25, D. C.

and

MARTIN SACKS, Regional Attorney  
12th Region, NLRB  
Ross Building, 112 Cass Street  
Tampa, Florida

• • • • •

NLRB Form 702  
(9-1-59)UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARDForm approved  
NLRB Form 702-60-2001-10

## PETITION

INSTRUCTIONS.—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

If more space is required for any one item, attach additional sheets, numbering each accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

## 1. Purpose of this Petition (Check only the one for which it appropriate)

- A. ☒ **RC—CERTIFICATION OF REPRESENTATIVE (INDIVIDUAL, GROUP, LABOR ORGANIZATION).**—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining, subject to section 9 (a) and (c) of the act.
- B. ☐ **RM—REPRESENTATION (EMPLOYEE).**—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner as defined in section 9(a) of the act.
- C. ☐ **RD—DISCERTIFICATION.**—A substantial number of employees want that the certified or currently recognized bargaining representative is no longer their representative as defined in section 9(a) of the act.
- D. ☐ **UD—WITHDRAWAL OF UNION SHOP AUTHORITY.**—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.

NOTE.—If a charge under section 8(b)(7) of the act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.

2. Name of Employer

Employee Representative to Contact

Address of Petitioner (Street and number, city, state, and zone)

666 South Avenue, Atlanta, Georgia

4. Type of Establishment (Factory, store, institution, etc.)

5. General Principal Product or Service

## 3. Description of Unit Involved (If more space is needed, continue on another sheet)

Included

All persons and units located at the Campbell Corp. two terminals in Miami, St. Petersburg, Tampa and Jacksonville, Florida

Excluded

All other employees

6a. Number of Employees in Unit

65 Approx.

6b. Is this petition supported by 30% or more of the employees in the unit?  
☐ YES ☐ NO

(If you have checked box RC in I.A. above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. ☐ Request for recognition as bargaining representative was made (at \_\_\_\_\_ Month, day, year) and Employer declined recognition on or about \_\_\_\_\_ (If no reply received, so state) (Month, day, year)7b. ☐ Petitioner is currently recognized as bargaining representative and desires certification under the act.

## 8. Recognized or Certified Bargaining Agent (If there is none, so state)

Name

Appellation

Address

Date of Recognition or Certification

9. Date of expiration of current contract, if any (Show month, day, and year)

10. If you have checked box RC in I.A. above, show here the date of expiration of agreement concerning union shop (Month, day, and year)

11a. Is there now a strike or picketing at the Employer's establishment(s)?  
YES ☐ NO ☐

11b. If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of \_\_\_\_\_ (Insert name)

Organization of \_\_\_\_\_ (Insert address)

Since \_\_\_\_\_ (Show month, day, and year)

12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c) which have claimed recognition as bargaining representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 3 above. (If none, so state)

NAME	APPELLATION	ADDRESS	DATE OF CLAIM (Required only if Petitioner is filed by Employer)

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

AND I HEREBY REQUEST THAT THE NATIONAL LABOR RELATIONS BOARD PROCEED UNDER ITS PROPER AUTHORITY.

By: /s/ U.S. Union

General Secretary, Board Member

U.S. Union

22-7400

Address of Petitioner (Street and number, city, state, and zone)  
666 South Avenue, Atlanta, Georgia





Form NLRB-104  
(11-59)UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARDForm NLRB-104  
Rev. 11-59

## PETITION

INSTRUCTIONS.—Submit an original and five (5) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.  
If more space is required for any one item, attach additional sheets, containing item number(s).

CASE NO.	10-40-100
DATE FILED	May 25, 1959

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority.

## 1. Purpose of this Petition (Check only the one for which it appropriate)

- A. ☒ RC—CERTIFICATION OF REPRESENTATIVE (INDIVIDUAL, GROUP, LABOR ORGANIZATION).—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining, pursuant to section 9 (a) and (c) of the act.
- B. ☐ RM—REPRESENTATION (EMPLOYEES).—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner as defined in section 9(a) of the act.
- C. ☐ RD—DECERTIFICATION.—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative as defined in section 9(a) of the act.
- D. ☐ UD—WITHDRAWAL OF UNDER SHEET AUTHORITY.—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.

NOTE.—If a charge under section 8(b)(7) of the act has been filed involving the Employer named herein, the appropriate following the description of the type of petition shall not be deemed made.

2. NAME OF EMPLOYER **St. Petersburg Shipyard** EMPLOYER REPRESENTATIVE TO CONTACT **None** PHONE NO. **None**

3. ADDRESS(ES) OF ESTABLISHMENT(S) INVOLVED (Street and number, city, state, and zone)

4a. TYPE OF ESTABLISHMENT (Factory, store, warehouse, etc.) **650 South Ave. Jacksonville, Fla. (Shuman, Inc.)**  
4b. EMPLOYER'S PRINCIPAL PRODUCT OR SERVICE

## 5. Description of Unit Involved (If more space is needed, continue on another sheet)

Included

**All persons and units located at the Shipyard Corp. two terminals in Miami, St. Petersburg, Tampa and Jacksonville, Florida**

Excluded

**All other employees**

6a. NUMBER OF EMPLOYEES IN UNIT

**65 Approx.**6b. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT?  
☐ YES ☐ NO

(If you have checked box RC or I.A. above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. ☐ Request for recognition as Bargaining Representative was made on **None** and Employer declined recognition on or about **None** (Month, day, year) (If n. a. reply: not made; so state)7b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

## 8. Recognized or Certified Bargaining Agent (If there is none, so state)

NAME **None** AFFILIATION **A**  
ADDRESS **None** DATE OF RECOGNITION OR CERTIFICATION **None**

9. DATE OF EXPIRATION OF CURRENT CONTRACT, if any (Show month, day, and year)

10. IF YOU HAVE CHECKED BOX 7a OR 7b ABOVE, SHOW HERE THE DATE OF EXECUTION OF AGREEMENT GRANTING UNION SHOP (Month, day, and year)

11a. IS THERE NOW A STRIKE OR PICKETING AT THE EMPLOYEE'S ESTABLISHMENT(S)?  
INVOLVED? **YES** **NO**

11b. IF SO, APPROXIMATELY HOW MANY EMPLOYEES ARE PARTICIPATING?

11c. THE EMPLOYEE HAS BEEN PICKETED BY OR ON BEHALF OF **None** (Insert name)ORGANIZATION OF **None** (Insert address)DATE **None** (Show month, day, and year)

12. ORGANIZATIONS OR INDIVIDUALS OTHER THAN PETITIONER (AND OTHER THAN THOSE NAMED IN ITEMS 8 AND 11c), WHICH HAVE CLAIMED RECOGNITION AS BARGAINING REPRESENTATIVE AND OTHER ORGANIZATIONS AND INDIVIDUALS KNOWN TO HAVE A REPRESENTATIVE INTEREST IN ANY EMPLOYEES IN THE UNIT DESCRIBED IN ITEM 5 ABOVE. (If none, so state)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM (Required only if Petitioner is filed by Employer)

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

**Assignment Association of Street, Electric Railway and Motor Coach Employees of America, St. P.**  
(Petitioner and affiliation, if any)By **J. J. Connelley** representative in person filing petitionWitness **None** (Date, if any)Attest: **J. J. Connelley** 1001 Convention Ave., S.W.  
Secretary, NLRB (Type and number, city, state, and zone)

NLRB-104-100

WHOLLY FALSE STATEMENT ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)



[fol. 72d]

## EXHIBIT B TO MOTION

Form NLRB 1415  
(6-61)

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS  
BOARD

THE GREYHOUND CORPORATION (SOUTHERN GREYHOUND  
LINES DIVISION) AND FLOORS, INC. OF FLORIDA<sup>1</sup>  
EMPLOYER

and

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC  
RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,  
AFL-CIO, PETITIONER

Case No. 12-RC-1209

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed, a hearing was held before a hearing officer of the National Labor Relations Board. His rulings made at the hearing are free from prejudicial error and are affirmed.

Upon the entire record, the Board finds:

1. The employer is engaged in commerce within the meaning of the Act.

2. The labor organization named below claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer, within Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within Section 9 (b) of the Act:

° All porters, janitors<sup>2</sup> and maids working at the Grey-

<sup>1</sup> Names appear as corrected at the hearing. Herein, they are referred to as Greyhound and Floors, respectively.

<sup>2</sup> The Petition was amended at the hearing to include janitors.

hound Corporation's bus terminals in Miami, St. Petersburg, Tampa and Jacksonville, Florida, excluding all other employees of the Greyhound Corporation and Floors, Inc. of Florida.<sup>3</sup>

<sup>3</sup> Petitioner seeks a single unit of all porters, janitors and maids employed in the above-described Greyhound terminals, contending that Greyhound is the Employer of the employees sought, or at least their joint employer with Floors, and that the unit is appropriate as a residual unit of all unrepresented Greyhound employees at the terminals in issue. Alternatively, Petitioner contends that even if the Board finds that the employees sought are employed by Floors, and that Floors is an independent contractor, the unit sought is still appropriate because such employees comprise a homogeneous, distinct group. Greyhound and Floors contend that the porters, janitors and maids are employed by Floors, an independent contractor, and Floors further argues that the appropriate unit consists of either all its employees in the above-described cities or three separate units of all its employees in (1) Tampa-St. Petersburg, (2) Miami, and (3) Jacksonville. Petitioner is unwilling to represent Floors' employees who do not work at the above-described terminals.

It appears that Floors hires, pays, disciplines, transfers, promotes and discharges the porters, janitors and maids. However, it also appears that Greyhound's terminal managers confer with Floors' supervisors in setting up work schedules and in determining the number of employees required to meet those schedules. Moreover, it also appears that Floors' supervisors may visit the Greyhound terminals on an irregular basis and on occasion may not appear for as much as two days at a time; and that the employees sought, including porters in handling baggage, receive work instructions from Greyhound terminal officials. In addition, the record also shows that Greyhound, on one occasion, prompted the discharge of a porter whom it felt to be an unsatisfactory employee. In view of the common control over the employees sought, we find both Greyhound and Floors to be their joint employer. See *Panther Coal Company, Inc., et al.*, 128 NLRB 409, *West Texas Utilities Company*, 108 NLRB 407, 413-414, *enfd* 218 F. 2d 824 (C.A. 5); *cert. denied*, 349 U.S. 953. We find further that such a unit consisting of all employees under the joint employer relationship is appropriate.

**PHILIP RAY RODGERS, MEMBER, dissenting:**

On the basis of the record herein, I would find that the employees sought are employees of Floors, that Floors is an independent contractor, and that the only appropriate unit is one comprised of all of Floors' employees in the above-described localities. Accordingly, I would dismiss the petition.

Philip Ray Rodgers, Member  
NATIONAL LABOR RELATIONS BOARD



## **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date. Those eligible shall vote whether (or not) they desire to be represented for collective bargaining purposes, by Amalgamated Association of Street, Electric Railway, and Motor Coast Employees of America, AFL-CIO.

FRANK W. McCULLOCH, Chairman  
BOYD LEEDOM, Member  
JOHN H. FANNING, Member  
GERALD A. BROWN, Member  
NATIONAL LABOR RELATIONS BOARD

[SEAL]

Dated, Washington, D. C. May 3, 1962.

[fol. 72c]

**EXHIBIT C TO MOTION****UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS  
BOARD****Case No. 12-RC-1209****THE GREYHOUND CORPORATION (SOUTHERN GREYHOUND  
LINES DIVISION) AND FLOORS, INC. OF FLORIDA, EMPLOYER****and****AMALGAMATED ASSOCIATION OF STREET, ELECTRIC  
RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,  
AFL-CIO, PETITIONER****ORDER DENYING MOTION**

On May 8, 1962, the Board issued a Decision and Direction of Election in the above-entitled proceeding. Thereafter, on May 11, 1962, Floors, Inc. filed a Motion for Reconsideration, in which it moved the Board to grant its motion that the aforesaid Decision and Direction of Election be vacated and the Petition dismissed. On May 16, 1962, the Petitioner filed a statement in opposition. The Board having duly considered the matter,

IT IS HEREBY ORDERED that the said Motion for Reconsideration be, and it hereby is, denied, as presenting nothing not previously considered by the Board.

Dated, Washington, D. C., May 25, 1962.

By direction of the Board:

GEORGE A. LEET  
Associate Executive Secretary

[fols. 73-96] • • •

[fol. 97]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION.—  
October 10, 1962.

[Omitted in Printing]

[fol. 98]

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT.**

---

**No. 19755**

---

**HAROLD A. BOIRE, Regional Director, Twelfth Region,  
National Labor Relations Board, APPELLANT**

*versus*

**THE GREYHOUND CORPORATION, APPELLEE**

---

**Appeal from the United States District Court for the  
Southern District of Florida, at Tampa.**

---

**Before JONES and BELL, Circuit Judges, and CARSWELL,  
District Judge.**

**OPINION—November 21, 1962**

**PER CURIAM:** The questions in this important case were carefully considered by the district court and discussed by the judge to whom the case was assigned. *Greyhound Corporation v. Boire*, 205 F. Supp. 686. We find ourselves in agreement with the principles there stated and the decision there reached. The judgment of the district court is

**AFFIRMED.**

**IN UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**October Term, 1962**

**No. 19,755**

**D. C. Docket No. 4414-Civ-T**

**HAROLD A. BOIRE, Regional Director, Twelfth Region,  
National Labor Relations Board, APPELLANT**

**versus**

**THE GREYHOUND CORPORATION, APPELLEE**

**Appeal from the United States District Court for the  
Southern District of Florida.**

**Before JONES and BELL, Circuit Judges, and CARSWELL,  
District Judge.**

**JUDGMENT—November 21, 1962**

**This cause came on to be heard on the transcript of  
the record from the United States District Court for the  
Southern District of Florida, and was argued by counsel;**

**• ON CONSIDERATION WHEREOF, It is now here ordered  
and adjudged by this Court that the judgment of the  
said District Court in this cause be, and the same is  
hereby, affirmed.**

**Issued: December 19, 1962**

**[fol. 100]**

**[Clerk's Certificate to foregoing  
transcript omitted in printing]**



[fol. 101]

**SUPREME COURT OF THE UNITED STATES**

**No. 844, October Term, 1962**

**HAROLD A. BOIRE, Regional Director, Twelfth Region,  
National Labor Relations Board, PETITIONER**

**vs.**

**THE GREYHOUND CORPORATION**

**ORDER ALLOWING CERTIORARI—April 15, 1963**

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

○And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

HAROLD A. BOIRE, REGIONAL DIRECTOR, TWELFTH  
REGION, NATIONAL LABOR RELATIONS BOARD, PETI-  
TIONER

v.

THE GREYHOUND CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Regional Director of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in this case on November 21, 1962.

## OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Appendix A, *infra*, p. 13) is reported at 309 F. 2d 397. The decision of the district court (Appendix A, *infra*, pp. 14-24; R. 60-69)<sup>o</sup> is reported at

<sup>1</sup>“R.” refers to the printed record and proceedings in the court of appeals which have been certified by the clerk of that court and lodged with this Court. The Regional Director’s motion to dismiss the complaint (cited herein as “R.D. Mo-

205 F. Supp. 686. The Board's Decision and Direction of Election (R. 10-13) is not officially reported.

#### JURISDICTION

The judgment of the court of appeals was entered on November 21, 1962 (Appendix A, *infra*, pp. 24-25). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Whether a federal district court has jurisdiction, in an independent action brought by an employer, to enjoin a representation election directed by the National Labor Relations Board pursuant to Section 9 of the National Labor Relations Act.

#### STATUTES INVOLVED

The relevant statutory provisions are set forth in Appendix B, *infra*, pp. 26-29.

#### STATEMENT

##### A. THE REPRESENTATION PROCEEDING

In April 1961, the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO ("the Union") filed a petition pursuant to Section 9 of the National Labor Relations Act with the Board, requesting that a representation

tion"), with attached exhibits, was inadvertently omitted from the printed record in the court of appeals. (It was before that court as an appendix to the Regional Director's brief.) Copies of this document have been certified by the Clerk of the District Court for the Southern District of Florida, Tampa Division, and lodged with the Court.

election be conducted among the porters, janitors and maids employed at the bus terminals operated by the Greyhound Corporation in Miami, St. Petersburg, Tampa, and Jacksonville, Florida. These employees were on the payroll of Floors, Inc., of Florida ("Floors"), which had contracts with Greyhound to provide certain services at the four bus terminals. The petition asserted that Greyhound was in fact the employer of the employees or at least their joint employer with Floors (R. 11).

Thereafter, a hearing was held on this petition in which Greyhound, Floors and the Union participated. At the hearing, Greyhound and Floors contended that Floors was the sole employer of the porters, maids and janitors. In addition, Floors contended that the unit sought by the Union was inappropriate. On May 3, 1962, the Board issued its Decision and Direction of Election in which it found, *inter alia*, that Greyhound and Floors were the joint employer of the employees in question and that a unit composed of all the employees under the joint employer relationship was an appropriate unit in which to conduct an election.<sup>2</sup> Accordingly, the Board directed that an

<sup>2</sup> The Board found that, although "Floors hires, pays, disciplines, transfers, promotes and discharges" the employees involved, "Greyhound's terminal managers confer with Floors' supervisors in setting up work schedules and in determining the number of employees required to meet those schedules," Floors' supervisors visited "the Greyhound terminals on an irregular basis," the employees received work instructions from Greyhound officials, and, on one occasion, Greyhound obtained the discharge of an unsatisfactory porter. Member Rodgers dissented from the joint employer finding (R. 11-12, n. 3).



4

election be held among those employees (R. 10-13). On May 11, 1962, Floors filed a motion for reconsideration, which was denied (Exh. C, attached to R.D. Motion).

#### B. THE INSTANT SUIT

On May 24, 1962, Greyhound filed suit in the United States District Court, Southern District of Florida, Tampa Division, to have the Board's Decision and Direction of Election reviewed and set aside (R. 1-44). The complaint alleged that the Board's action violated certain provisions of the National Labor Relations Act and the Fifth Amendment to the Constitution and that the court had jurisdiction under 28 U.S.C. 1337 (R. 2-5). The same day, upon Greyhound's *ex parte* application, the district court issued a temporary restraining order against the holding of the election (R. 52-54). The Regional Director then moved to dismiss the complaint, or in the alternative for summary judgment, on the grounds that: (1) the district court lacked jurisdiction over the subject matter of the action; (2) the district court lacked jurisdiction over the members of the Board who were indispensable parties to the action; (3) the action was premature; and (4) the complaint failed to state a claim warranting judicial relief (R.D. Motion).

On June 11, 1962, after hearing, the district court issued a permanent injunction enjoining the Regional Director from proceeding further in the representation case and denied the Director's motion to dismiss the complaint or in the alternative for summary judgment (App. A, *infra*, pp. 14-24). The court found that the factors relied upon by the Board were "as a

matter of law insufficient to create a joint employer relationship with respect to the employees in said unit; but that, on the contrary, said findings establish as a matter of law that Floors, Inc., is an independent contractor and, for the purposes of collective bargaining purposes, its employees are not the employees of [Greyhound]" (App. A, *infra*, pp. 15-16). Concluding that Section 9 of the Act "contemplates representation proceedings only as regards the employer of the employees comprising the unit found appropriate by the Board," the court held that the Board had exceeded its statutory authority in directing an election in a unit composed of employees at the Greyhound terminals (*ibid.*). The court further held that it had jurisdiction of the suit under *Leedom v. Kyne*, 358 U.S. 184, rejecting the contention that that decision had no application to an employer, like Greyhound, who could obtain review of the election in the court of appeals under Section 10 (e) and (f) of the Act in connection with review of any unfair labor practice order that the Board might subsequently issue (App. A, *infra*, pp. 17, 18-20).

The Court of Appeals for the Fifth Circuit affirmed, on the opinion of the district court (App. A, *infra*, p. 13).

#### REASONS FOR GRANTING THE WRIT

The holding of the court of appeals misconceives the scope of this Court's decision in *Leedom v. Kyne*, 358 U.S. 184; it is contrary to the decisions of the Court of Appeals for the District of Columbia Circuit; and it raises a question of great importance to the future administration of the Act.

1. In *Leedom v. Kyne*, 358 U.S. 184, this Court held that the federal district court had jurisdiction, under its general equity powers, of a suit brought by a labor organization to review and set aside a certification issued after an election under Section 9 of the Act. The Board had certified the labor organization as the exclusive representative of a unit consisting of professional and non-professional employees, and the labor organization contended that the Board's action contravened Section 9(b)(1) of the Act in that non-professionals were put in the unit without first affording the professionals the opportunity to vote on whether the non-professionals should be included. The Court, in sustaining the district court's exercise of jurisdiction, emphasized (1) that the Board had acted "in excess of its delegated powers and contrary to a specific prohibition in the Act" (*id.* at 188); and (2) that "absence of jurisdiction of the federal courts' would mean 'a sacrifice or obliteration of a right which Congress' has given professional employees, for there is no other means within their control \* \* \* to protect and enforce that right" (*id.* at 190).<sup>3</sup>

<sup>3</sup> A labor organization which is aggrieved by a Board representation determination is usually not in a position to utilize the statutory review procedure at all, for having been denied a certification it could not complain about an employer's refusal to bargain with it. It has been suggested, however, that the labor organization in *Kyne*, having obtained a certification (though not in the unit it desired), was in a position where, theoretically at least, it could refuse to bargain with the employer for the non-professionals in the union and thereby obtain judicial review under Section 10 of the Act. See 73 Harv. L. Rev. 84,

The situation here is entirely different and, as we read the opinion, nothing in *Leedom v. Kyne* permits an employer to circumvent the statutory procedure for review of representation proceedings under Section 10 by resorting to an independent equity suit in the district court to review a Direction of Election. Cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41. Even if it be assumed that the Board exceeded its statutory authority (as the district court found, but we deny),\* there exists an adequate procedure under

219-220 (1959); *Empresa Hondurena de Vapores, S.A. v. McLeod*, 300 F. 2d 222, 229 (C.A. 2). Whatever the merits of this suggestion, the means of securing statutory review available to the labor organization were much less dependable than an employer's refusal to bargain. This was recognized by the court of appeals in *Kyne* which pointed out (249 F. 2d 490, 492):

Here review by way of § 10 is too remote and conjectural to be viewed as providing an adequate remedy \* \* \*. Since the employer is not aggrieved by the Board's inclusion of the nine non-professionals, he cannot be relied upon to refuse to bargain and thus make it possible for the Association to bring a reviewable § 10 proceeding. Nor is it likely that an Engineers Association refusal to bargain for the nine non-professionals would induce the employer to seek review since he would then be free to deal with all employees individually. Nor could we expect such refusal to induce any of the nine non-professionals to seek review. They are hardly likely to insist upon placing their fate in the hands of a reluctant bargaining representative.

It seems clear from its opinion that this Court accepted the position of the court of appeals and decided *Kyne* on the basis that the equity suit was the sole realistic means open to the labor organization to test the legality of the Board's action (358 U.S. at 190).

\*The district court's conclusion (App. A, *infra*, pp. 15-17) appears to rest on the premise that Floors is an independ-



the Act—which was lacking in *Kyne*—whereby Greyhound could have its contentions reviewed in the court of appeals. If the Union won the election and were certified, Greyhound could refuse to bargain with it on the ground that the certification was invalid. Were the Board then to find that the refusal constituted an unfair labor practice and to issue an order compelling Greyhound to bargain based on the certification, Greyhound could obtain review of that order and the underlying certification in the court of appeals under Sections 9(d) and 10 (e) or (f) of the Act (App. B., *infra*, pp. 27-29). Until such review had been obtained in the court of appeals, Greyhound would not be required to take any action based on the Board representation decision, nor would it incur any legal

ent contractor vis-a-vis Greyhound and that thus it follows that Greyhound cannot be an "employer" of the Floors employees working at the Greyhound terminals. Assuming *arguendo* that Floors is sufficiently independent of Greyhound so that it would not be regarded as an "employee" or a mere department of Greyhound, it does not follow that Floors could not, with respect to the workers whom it hires, share control over their working conditions with Greyhound to such an extent as to make the latter a co-employer of those workers. The test of whether a person is an "employer" of particular employees, within the meaning of Section 2(2) of the Act, is whether he possesses power to control their terms and conditions of employment. See *West Texas Utilities Co.*, 108 NLRB 407, 413-414, enforced, 218 F. 2d 824 (C.A. 5); *Panther Coal Co., Inc.*, 128 NLRB 409. Cf. *Operating Engineers Local Union No. 3 v. National Labor Relations Board*, 266 F. 2d 905, 909 (C.A. D.C.), certiorari denied, 361 U.S. 834. The issue of control, turning as it does on the facts of each case, is best determined on a full administrative record. This record was not before the district court in the summary judgment proceedings below but would have been before the court of appeals had Greyhound followed the statutory review procedure detailed above.

injury. Since the statutory review procedure was available and adequate, *Kyne* afforded no basis for intervention by the district court.

Further, *Kyne* involved a suit to review a Board certification (the final step in a representation proceeding), whereas here *Greyhound* seeks review at the election stage. Since, if the Union were to lose the election, no certification would issue, it has been held that the holding of an election does not result in irreparable injury warranting the grant of equitable relief. *Madden v. Brotherhood and Union of Tr. Employees*, 147 F. 2d 439, 442 (C.A. 4); *Local Union 492 v. Schauffler*, 162 F. Supp. 121, 124 (E.D. Pa.); *Klein v. Herrick*, 41 F. Supp. 417, 423-424 (S.D. N.Y.) Nothing in *Kyne* suggests that, even in a situation where the statutory review procedure is inadequate and the district court could thus be resorted to for review of a certification, the courts would have power to enjoin a Board election. See Cox, *The Major Labor Decisions of the Supreme Court, October Term 1958*, reprinted in Gellhorn and Byse, *Administrative Law: Cases and Comments* (1960), 441, 447-448.

The legislative history of the Wagner and Taft-Hartley Acts shows that Congress deliberately confined the employer's opportunity to obtain review of representation proceedings to the procedure specified in Section 9(d) (App. B, *infra*, p. 27), i.e., to cases in which a certification forms the basis for an unfair labor practice order and that order is before the court of appeals for review or enforcement under Section 10 (e) or (f) of the Act (App. B, *infra*, pp. 27-29).

Congress carefully considered proposals which would have permitted direct review of representation determinations and rejected them because review at the representation stage would afford too great an opportunity for dilatory tactics, thus frustrating the statute's basic policy of promoting collective bargaining.\*

2. The holding of the Fifth Circuit, that *Kyne* permits an employer who has an adequate statutory remedy to obtain review in the district court of an allegedly erroneous Board representation determination, is in direct conflict with the decisions of the Court of Appeals for the District of Columbia Circuit. *General Cable Corp. v. Leedom*, 278 F. 2d 237, 239 (C.A. D.C.); *Atlas Life Insurance Co. v. Leedom*, 284 F. 2d 231 (C.A. D.C.); see also, *Norris v. National Labor Relations Board*, 177 F. 2d 26 (C.A. D.C.).<sup>c</sup> Other courts have given *Kyne* the interpretation

\*The legislative history is summarized in the dissenting opinion of Mr. Justice Brennan in *Kyne*, 358 U.S. 184, 191-194.

Greyhound's argument, accepted by the district court below (App. A, *infra*, pp. 19-20), that the threat of injury due to picketing affords a basis for judicial intervention before issuance of a final unfair labor practice order, was made in support of legislation proposed in 1938 and again in 1947, which would have established such a remedy. In both cases, the proposals were rejected as contrary to the primary purpose of the Wagner and Taft-Hartley Acts, respectively. See *ibid.*, *Madden v. Brotherhood and Union of Tr. Employees*, 147 F. 2d 439, 443-444 (C.A. 4); H. Rep. 245, 80th Cong., 1st Sess., p. 43; 93 Cong. Rec. 6444.

<sup>c</sup>The Sixth Circuit has reflected the same view in denying a stay pending appeal in a case similar to the instant one. *Eastern Greyhound Lines v. Fusco*, 51 LRRM 2278 (N.D. Ohio), September 12, 1962, stay pending appeal denial, 51 LRRM 2661 (C.A. 6), December 4, 1962. See also, *Suprenant Mfg. Co. v. Alpert* (D. Mass.) Jan. 31, 1963, Wyzanski, J.

adopted by the court below, holding that a district court suit may be maintained by any party—either an employer or a labor organization—who presents a substantial claim that the Board, in a representation proceeding, has exceeded its statutory authority.<sup>7</sup> See *Boyles v. Waers*, 291 F. 2d 791 (C.A. 10); *Consolidated Edison Co. v. McLeod*, 302 F. 2d 354 (C.A. 2); *U.S. Pillow Corp. v. McLeod*, 208 F. Supp. 337 (S.D. N.Y.);<sup>8</sup> cf. *Empresa Hondurena de Vapores, S.A. v. McLeod*, 300 F. 2d 222, 227-229 (C.A. 2), pending on writ of certiorari, Nos. 91 and 93, this Term. See also, *Deering Milliken, Inc. v. Johnston*, 295 F. 2d 856 (C.A. 4).

Review by this Court is necessary to resolve this conflict and confusion among the circuits over the scope of *Kyne*. If the decision below were to stand, it would provide added impetus for employer suits to review Board orders in representation proceedings; the number of such suits has already sharply increased since the decision in *Leedom v. Kyne*.<sup>9</sup>

<sup>7</sup> Prior to *Kyne*, the Fifth Circuit had held that the employer was confined to the statutory review procedure. *Volney Felt Mills v. Le Bus*, 196 F. 2d 497 (C.A. 5).

<sup>8</sup> In each of these three cases, *Boyles*, *Consolidated Edison* and *U.S. Pillow*, the court rejected the employer's contention on the merits. There was, therefore, no occasion for the Board to seek review by this Court of the jurisdictional issue presented here.

<sup>9</sup> In the four-year period since this Court's decision in *Kyne*, there have been 29 such suits, as compared with 7 in a comparable period preceding that decision.



## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

ARCHIBALD COX,  
*Solicitor General.*

STUART ROTHMAN,  
*General Counsel,*  
DOMINICK L. MANOLI,  
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HERMAN M. LEVY,  
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*National Labor Relations Board.*

FEBRUARY 1963.

**APPENDIX A**

**IN THE UNITED STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT**

**No. 19755**

**HAROLD A. BOIRE, REGIONAL DIRECTOR, TWELFTH  
REGION, NATIONAL LABOR RELATIONS BOARD,  
APPELLANT**

*versus*

**THE GREYHOUND CORPORATION, APPELLEE**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF FLORIDA, AT TAMPA**

**(November 21, 1962)**

**Before JONES and BELL, Circuit Judges, and  
CARSWELL, District Judge.**

**PER CURIAM:** The questions in this important case were carefully considered by the district court and discussed by the judge to whom the case was assigned. *Greyhound Corporation v. Boire*, 205 F. Supp. 686. We find ourselves in agreement with the principles there stated and the decision there reached. The judgment of the district court is

***Affirmed.***

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

TAMPA DIVISION

No. 4414 Civ. T.

THE GREYHOUND CORPORATION, A DELAWARE  
CORPORATION, PLAINTIFF

vs.

HAROLD A. BOIRE, AS REGIONAL DIRECTOR, TWELFTH  
REGION, NATIONAL LABOR RELATIONS BOARD, DE-  
FENDANT

FINAL DECREE FOR PERMANENT INJUNCTION AND  
MEMORANDUM OPINION

*LIEB, District Judge*

THIS CAUSE came on to be heard upon the plaintiff's Prayer for Preliminary Injunction, said hearing having been provided in the Court's Temporary Restraining Order and Order Setting Hearing for Preliminary Injunction entered May 24, 1962. Prior to the hearing, the defendant filed a Motion to Dismiss and, in the alternative, a Motion for Summary Judgment. Plaintiff presented its Complaint and exhibits attached thereto, together with an affidavit of an officer of Floors, Inc., of Florida, and an affidavit of the regional manager of plaintiff, the latter affidavit, in part, swearing to the allegations of the Complaint. No affidavits were presented on behalf of the defendant nor were any sworn pleadings filed on behalf of said defendant.

After considering the matters hereinabove referred to and hearing argument of counsel for the respective parties, the Court is of the opinion that there are

no material issues of fact, and the issues of law as resolved herein make it unnecessary and undesirable for the Court to issue a temporary injunction but that a permanent injunction is warranted by the findings hereinafter set forth.

The plaintiff contends that a Decision and Direction of Election of the National Labor Relations Board in that Board's case No. 12-RC-1209, issuing certain directions to the defendant herein, is contrary to the express provisions of the National Labor Relations Act, as amended, and is beyond the statutory powers vested in the National Labor Relations Board. This contention is predicated upon the fact that in said Decision and Direction of Election, the Board found that a corporate entity other than plaintiff, *vis.*, Floors, Inc., of Florida, hires, pays, disciplines, transfers, promotes and discharges the porters, janitors and maids who are alleged to constitute an appropriate unit for the purposes of collective bargaining; but nevertheless also found that the said Floors, Inc., and the plaintiff, were joint employers of the employees in the said unit. The findings of the Board, allegedly in support of a joint employer relationship, are that the plaintiff's terminal managers confer with Floors' supervisors in setting up work schedules and in determining the number of employees required to meet those schedules; that Floors' supervisors may visit the plaintiff's terminals on an irregular basis, and on occasion may not appear for as much as two days at a time; that the employees receive work instructions from plaintiff's terminal officials; and that on one occasion the plaintiff prompted the discharge of a porter whom it felt to be an unsatisfactory employee. The Court is of the opinion that the findings of the Board, as recited, are, as a matter of



law, insufficient to create a joint employer relationship with respect to the employees in said unit; but that, on the contrary, said findings establish as a matter of law that Floors, Inc., is an independent contractor and, for the purposes of collective bargaining, its employees are not the employees of the plaintiff. The Court is therefore of the opinion and finds that with regard to representation proceedings the Board is prohibited by the provisions of the National Labor Relations Act, as amended, from conducting a representation election wherein the plaintiff is a party-employer with regard to persons who, under the Act, are not its employees. The Court finds that Section 9 of the Act expressly contemplates representation proceedings only as regards the employer of the employees comprising the unit found to be appropriate by the Board. The Court further finds that by virtue of Section 2(3) of the Act, any individual having the status of an independent contractor is expressly excluded from the term "employee", as defined in that Act. As a matter of law, the employees of an independent contractor do not stand in the relationship of employer-employee with regard to the principal who employs the independent contractor for the purpose of Section 9 of the Act, unless the facts involve an alter ego situation, that is where one employer is in fact the alter ego of another employer, which is clearly not the case in this instance. To follow a contrary interpretation of the Act would be patently absurd. One can readily see that the prime object of the compulsory bargaining feature of the Act is to bargain on wages and working conditions. It is impossible to comprehend how an employer could bargain in good faith about wages with employees who are not paid by said employer.

and over whom the said employer cannot exercise the power of hiring or firing.

The Court further finds that this case is controlled by the decision of the Supreme Court of the United States in *Leedom v. Kyne* (1958), 358 U.S. 184, 3 L. Ed. 2d 210, 79 Sup. Ct. 180, and that this Court has jurisdiction of the action under Section 24(8) of the Judicial Code, 28 U.S.C.A., § 1337, because the action arises under an Act of Congress regulating commerce. The Court further finds that in its said Decision and Direction of Election the Board has attempted to act in excess of its delegated power, particularly in view of the legislative history of the portion of the Taft-Hartley Act of 1947 which amended the definition of the word "employee" so as to expressly exclude "independent contractors".

In further support of the Court's finding that there is no employer-employee relationship, as between the persons described in the unit and the plaintiff, are affidavits which are not challenged by counter-affidavits in this case, demonstrating conclusively that, with respect to the said employees, Floors, Inc., and only Floors, Inc., pays social security taxes and unemployment compensation insurance, withholds Federal income taxes, determines rates of pay and hours of employment, provides day to day supervision, furnishes all supplies and equipment used by its employees, and retains and exercises the right to use its employees on whatever job it desires; and that the employees in the purported unit constitute only a relative few of Floors' employees in the areas involved, such other employees being engaged in activities wholly unrelated to the plaintiff.

The defendant's contention is that this Court is without jurisdiction of the subject matter, first, be-

cause the subject matter is exclusively within the competence and jurisdiction of the Board by virtue of the National Labor Relations Act, and as amended by the Taft-Hartley Act, and second, even if this Court is not deprived of jurisdiction because of the Acts cited above, it lacks equity jurisdiction because of the availability of other adequate remedies which exist before the Board and before the Court of Appeals through the enforcement proceedings provided for in the Act.

With regard to the first contention, it is the opinion of the Court that the subject matter involved in this litigation is not the subject matter which is within the exclusive jurisdiction and competence of the Board, and the matter involved in this cause does not involve a review of an erroneous decision of the Board but rather involves an attack on the action taken by the Board which it was not authorized to take under the statute. Representation orders of the Board have not been vested with complete immunity from injunction, either by inferences from the National Labor Relations Act on the principle of *Myers v. Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 58 S. Ct. 459, 82 L. Ed. 638 (1938). (See *Empresa Hondurena de Vapores, S.A., v. Ivan C. McLeod*, Regional Director, etc. (2 Cir. 1962), 300 F. 2d 222.) Whether or not this Court is authorized to intervene in a representation proceeding depends ultimately on the facts presented to it; and if it appears that the Board exceeded its delegated powers, either by acting contrary to a mandatory prohibition of the Act (see *Leedom v. Kyne*, *supra*) or by acting clearly contrary to the over-all spirit of the Act and the manifested intention of Congress (see *Empresa Hondurena de Vapores v. McLeod*, *supra*), then this Court cannot fail to exercise its equity powers to prevent a wrong.

With regard to the second contention that this Court lacks equity jurisdiction because of the availability of other remedies, it is the opinion of the Court that this contention is equally without merit. The method allegedly open to the plaintiff to contest the Board's decision is as follows: The plaintiff can refuse to bargain with the Union involved in this case when it is certified, and thereby plaintiff is open to an unfair labor practice charge. (29 U.S.C. § 158(a)(5).) As an incident to the hearing of such charge by the Board, and upon review by a United States Court of Appeals, the certification of the Union can be inquired into. (29 U.S.C. § 159(d), 160.) The defendant further contends in this respect that even under *Leedom v. Kyne, supra*, it is only the Union that is entitled to invoke the equity jurisdiction of Federal District Courts.

The defendant's contention that the alleged availability of this method of review bars the plaintiff from seeking relief from this Court does not bear close analysis. First, it presupposes that, upon the plaintiff's refusal to bargain in good faith, the Union will file an unfair labor charge. Second, it presupposes that, upon the filing of such an unfair labor charge by the Union, the Board will institute an enforcement proceeding. These presuppositions are patently without foundation. The likelihood that the Union will resort to the use of the powerful weapon of picketing, and thereby tie up with a handful of pickets the entire transportation system of the plaintiff, is far greater and more real than the likelihood that the Union will resort to filing an unfair labor charge with the Board.

Assuming, but not admitting, that the Union will file an unfair labor charge upon the plaintiff's refusal to bargain, the determination of the unfair labor



charge by the Board, and the enforcement proceeding, are known to be prolonged and very time-consuming; and picketing of the plaintiff by the Union while the case is being decided by the Court of Appeals could mean complete economic ruin to the plaintiff. Even if the plaintiff would ultimately prevail, its victory would, indeed, be a pyrrhic one. In the light of the foregoing, one is compelled to conclude that the said method of review, allegedly available to the plaintiff, is not an adequate remedy.

With regard to the contention that under *Leedom v. Kyne, supra*, only the Union can invoke the equity jurisdiction of the District Court, it is the opinion of the Court that nothing in the *Leedom* case indicates the proposition urged here by the defendant. This contention was rejected by the Court in *Worthington Pump and Machinery Corporation v. Douds, et al.* (1951, D.C. N.Y.), 97 F. Supp. 656, and this Court is in full agreement with the principles expressed in said case.

The defendant also contends that the Court lacks jurisdiction of the members of the National Labor Relations Board who are indispensable parties to this action. This contention is likewise without merit because the relief sought may be effectively granted against the defendant Regional Director (see *Empresa Hondurena de Vapores v. McLeod, supra*; *Williams v. Fanning* (1947), 332 U.S. 490, 92 L. Ed. 95; and *Bradley Lumber Co., etc., et al. v. National Labor Relations Board* (5 Cir. 1936), 84 F. 2d 97).

The defendant also contends that the action is premature. This is merely another way of saying that the plaintiff must exhaust administrative remedies provided with regard to unfair labor practice cases, as set forth in the National Labor Relations Act, as amended. This contention is likewise without merit.

for the same reasons assigned hereinabove with regard to the contention that the Court is without jurisdiction of the subject matter of this action.

Finally, the defendant contends that the Complaint fails to state a claim warranting relief. The Court finds this contention likewise to be without merit for the same reasons hereinabove assigned with regard to the contention that the Court is without jurisdiction of the subject matter and the contention that the action is premature.

For the reasons hereinabove assigned, the defendant's Motion to Dismiss will be denied.

Defendant moves, in the alternative, that a Summary Judgment be entered in his favor on the basis of the Complaint, and exhibits attached thereto, and the Motion, and exhibits attached thereto. The exhibits attached to the Complaint consist of the Decision and Direction of Election, which is the subject matter of the Complaint, together with letters from the assistant to the Regional Director, defendant herein, advising plaintiff of the immediacy of the proposed election, copies of agreements between the plaintiff and Floors, Inc., with respect to the services involved herein, and a certified copy of an Order of the United States District Court of the Southern District of Florida, Jacksonville Division, in an action between plaintiff and the petitioning Union in the instant case, wherein the Honorable Bryan Simpson, United States District Judge, found the contract between the plaintiff and Floors, Inc., to constitute an independent contractor relationship.

The exhibits to the Motion of the defendant are comprised of a Petition to the National Labor Relations Board, dated April 17, 1961, wherein the employees in the unit proposed by the National Labor Relations Board in this case petition for a representa-

tion election with regard to their employer, Floors, Inc.; an Amended Petition dated May 25, 1961, naming Southeastern Greyhound Lines and Floors, Inc., as the "employers"; a copy of the Decision and Direction of Election, which is also attached as an exhibit to the Complaint; a copy of an Order dated May 25, 1962, denying a Motion for Reconsideration in case No. 12-RC-1209, filed by Floors, Inc.; and a Memorandum in Support of Defendant's Motion to Dismiss the Complaint and for Summary Judgment. The Memorandum in Support of the Motions will not be construed as evidence in the case but merely as a legal memorandum or brief of the defendant.

The plaintiff filed with the Court, and served upon the defendant, an affidavit of the secretary of Floors, Inc., of Florida, setting forth in detail all of the elements which constitute Floors, Inc., as the sole employer of the employees in the proposed unit. The plaintiff also filed and served upon the defendant the affidavit of J. W. Cable, Regional Manager of the plaintiff for the territory covering the State of Florida, identifying under oath the various attachments to the Complaint, swearing to the allegations of the Complaint, and setting forth in substantial detail the relationship between the plaintiff and Floors, Inc., demonstrating a pure independent contractor relationship.

Inasmuch as the Motion for Summary Judgment of the defendant raises no issue of fact, and inasmuch as said Motion for Summary Judgment does not refute the allegations of the Complaint or of the affidavits in support thereof, but relies upon the same contention of law hereinabove referred to with regard to the Motion to Dismiss, and said contentions being found by the Court to be without merit, the said

Motion for Summary Judgment will likewise be denied.

The Court finds that the plaintiff has a statutory right not to be held to be an employer jointly and together with an independent contractor with respect to the employees of said independent contractor in a representation proceeding under the Act, and that the violation of the Act on the part of the National Labor Relations Board and the deprivation of said right of the plaintiff will cause the plaintiff to suffer irreparable injury unless the injunction prayed for be granted. The Court finds that the plaintiff has no adequate remedy at law. It is, therefore, upon consideration,

**ORDERED, ADJUDGED and DECREED:**

1. That the defendant, Harold A. Boire, as Regional Director of the Twelfth Region, National Labor Relations Board, his successors or designees, and all persons acting in his stead or under his direction or control, be, and they are hereby, permanently enjoined from conducting, or causing to be conducted, a representation election of all porters, janitors and maids working at The Greyhound Corporation's bus terminals in Miami, St. Petersburg, Tampa and Jacksonville, Florida, pursuant to the Decision and Direction of Election of the National Labor Relations Board in that Board's case No. 12-RC-1209, issued May 3, 1962, wherein the Greyhound Corporation (Southern Greyhound Lines Division) and Floors, Inc., of Florida, are alleged to be the employer, and Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO is alleged to be the petitioner.

2. That defendant's Motion to Dismiss be, and the same is hereby, denied.



3. That defendant's Motion for Summary Judgment be, and the same is hereby, denied.

4. That the defendant was not wrongfully restrained by the Temporary Restraining Order heretofore issued in this case and, therefore, that the bond given by the plaintiff as security required by Rule 65 of the Federal Rules of Civil Procedure may be dissolved and no other or further security need be given by the plaintiff in this cause.

DONE and ORDERED at Tampa, Florida, this 11th day of June, 1962.

/s/ JOSEPH P. LIEB,  
*United States District Judge.*

UNITED STATES COURT OF APPEALS FOR THE FIFTH  
CIRCUIT

OCTOBER TERM, 1962

No. 19755

D. C. Docket No. 4414-Civ-T

HAROLD A. BOIRE, REGIONAL DIRECTOR, TWELFTH  
REGION, NATIONAL LABOR RELATIONS BOARD, APPELLANT

*versus*

THE GREYHOUND CORPORATION, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF FLORIDA

Before JONES and BELL, *Circuit Judges*, and  
CARSWELL, *District Judge*.

JUDGMENT

This cause came on to be heard on the transcript of  
the record from the United States District Court for

the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued: November 21, 1962.

## APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes

both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; \* \* \*

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

#### SEC. 10. \* \* \*

(e) The Board shall have power to petition any court of appeals of the United States, \* \* \* within any circuit \* \* \* wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper,



and to make and enter a decree enforcing, modifying, and enforcing, as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. \* \* \* Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the \* \* \* Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of

the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1962 **3**

**HAROLD A. BOIRE, REGIONAL DIRECTOR,  
TWELFTH REGION, NATIONAL LABOR  
RELATIONS BOARD,  
PETITIONER**

**v.**

**THE GREYHOUND CORPORATION,  
RESPONDENT**

**MOTION OF AMALGAMATED ASSOCIATION OF  
STREET, ELECTRIC RAILWAY AND MOTOR  
COACH EMPLOYEES OF AMERICA, AFL-CIO,  
FOR LEAVE TO FILE APPENDED BRIEF AS  
AMICUS CURIAE IN SUPPORT OF PETITION  
FOR CERTIORARI.**

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IN THE

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OCTOBER TERM, 1962

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Comes now Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO (hereinafter "Amalgamated"), and moves the Court for leave to file the appended brief as amicus curiae in support of the petition for a writ of certiorari filed by the Solicitor General on behalf of the Regional Director of the National Labor Relations Board in the above case.<sup>1</sup>

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<sup>1</sup> Amalgamated, on February 21, 1963, sought consent of Respondent to the filing of a brief amicus curiae. Counsel for Respondent advised that Respondent would consent, *provided* that Petitioner consent to the filing of a brief amicus by Floors, Inc., if that party requests consent. Since Amalgamated has no control over whether Floors, Inc. will request consent to file a brief, amicus curiae, or whether the Solicitor General will grant consent, Amalgamated is proceeding on the assumption that, for the purpose of Rule 42 (3), consent by Respondent has been refused.



In accordance with Rule 42 (3), Amalgamated states the following in support of this motion:

1. Amalgamated is the labor organization which petitioned for the representation election directed by the National Labor Relations Board, the conduct of which was enjoined by the District Court, in an order which was affirmed by the Court below. As such, Amalgamated has a direct and vital interest in the review of the decision of the Court below that is the subject of the Petition for Certiorari. Amalgamated also expresses the interest of the employees involved in this proceeding who, since April 17, 1961 (when the representation petition was filed), have sought to be represented in collective bargaining, and are being denied the opportunity to select a collective bargaining representative by the holding of the Court below.

2. Amalgamated was granted permission to file a brief *amicus curiae* in the Court below. It was denied intervention, and was not permitted to argue.

3. In addition to the fact that Amalgamated has a direct interest in the subject matter of the instant Petition for Certiorari, this Motion should be granted because there are facts and issues of law, which may become relevant to a proper disposition of this case, and which, we believe, will not be adequately presented by the parties. This arises out of the following circumstances:

a. The decision of the Court below affirms an order of the District Court enjoining a representation election, which injunction was sought in an independent action brought by the Respondent employer.

b. The injunction was issued on the basis of a finding that the Board had exceeded its statutory authority in directing the election in question. The *per curiam* opinion of the Court below accepts, without more, "the principles there stated" and "the decision" of the District Court.

c. In the instant Petition for Certiorari, Petitioner limits the question presented to the issue of whether the District

Court had jurisdiction to enjoin the representation election in an action brought by the employer.

d. Amalgamated agrees that this question is of great importance; and, for all of the reasons stated by Petitioner, Amalgamated believes that certiorari should be granted, and that this Court should reverse the Court below and rule that the District Court was without jurisdiction to enjoin the representation election here involved.

e. However, Amalgamated further believes that, even if this Court were to rule, contrary to Petitioner, that in *Leedom v. Kyne*, 358 U.S. 184, this Court intended to open the door to the issuance by District Courts of injunctions against elections in actions brought by employers,<sup>2</sup> and, thus, even if this Court were to conclude that the District Court had jurisdiction to enjoin the election in this instance if the Board had exceeded its statutory authority, the District Court and the Court below erred in concluding that the Board had exceeded its statutory authority in directing the instant election.

f. Petitioner agrees that the District Court and the Court below erred in concluding that the Board had exceeded its statutory authority. (See Pet, p. 7) However, certain of the soundness of its position on the jurisdictional issue (and properly so), Petitioner chose to limit the question to that issue.

If, for any reason, this Court should sustain the decision below on this jurisdictional question, a proper disposition of this case, we submit, will require the Court to consider whether the Court below was correct in concluding that the Board had exceeded its statutory authority in directing the instant election.

It is to that issue that the appended brief is directed.

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<sup>2</sup> What this Court said and did in its very recent opinion in *McCulloch v. Sociedad Nacional de Marineros, et al.*, 31 U.S. Law Week 4212 (February 18, 1963), strongly suggests that quite the opposite is true.

**WHEREFORE**, Amalgamated moves that leave be granted to file the brief appended hereto, as amicus curiae, in support of the petition for a writ of certiorari.

Respectfully submitted,

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*Of Counsel*  
February 1963

No. 844

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1962

**HAROLD A. BOIRE, REGIONAL DIRECTOR,  
TWELFTH REGION, NATIONAL LABOR  
RELATIONS BOARD,  
PETITIONER**

**v.**

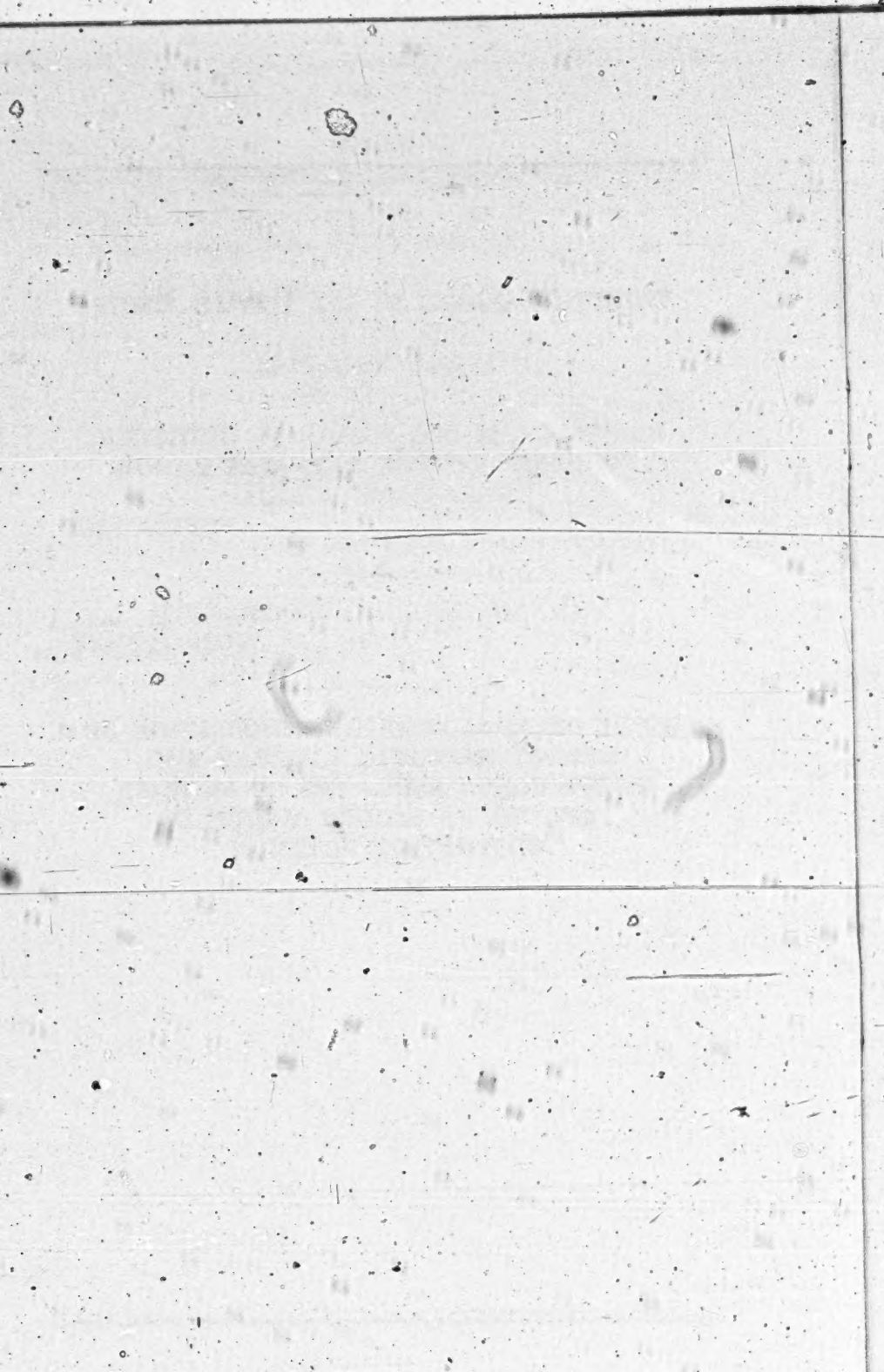
**THE GREYHOUND CORPORATION,  
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**BRIEF OF AMALGAMATED ASSOCIATION OF  
STREET, ELECTRIC RAILWAY AND  
MOTOR COACH EMPLOYEES OF AMERICA,  
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**STATUTE**

National Labor Relations Act (61 Stat. 136, 73 Stat. 519,  
29 U.S.C. Sec. 151, *et seq.*)  
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No. 844

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**BRIEF OF AMALGAMATED ASSOCIATION OF  
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AFL-CIO, AS AMICUS CURIAE IN  
SUPPORT OF PETITION.**

**INTRODUCTORY STATEMENT**

Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO, submits this brief in support of the petition for a writ of certiorari pursuant to leave of Court.

The interest of Amalgamated in this case has been set forth in the preceding Motion. As stated in that Motion, Amalgamated agrees with Petitioner that, even if it were to be assumed that the Board exceeded its statutory authority in directing the representation election here involved, the District Court was without jurisdiction to enjoin that election. In the argument that follows, however, Amalgamated will deal with the question that must be reached if, and only if, this Court should sustain the Court below on the jurisdiction issue—the question of whether the Court below properly concluded that the Board had exceeded its statutory power.

## ARGUMENT

**In Finding That Greyhound and Floors Constitute A Joint Employer and In Directing An Election In A Unit of The Employees Under The Joint Employer Relationship, The Board Acted in Accord With The Statute, and on The Basis of More Than Ample Evidence.**

The Board found that "in view of the common control over the employees sought, we find both Greyhound and Floors to be their joint employer." (R. 11-12)<sup>1</sup>

The District Court (whose reasoning was adopted by the Court below), in enjoining the election directed by the Board, stated that:

The Court is of the opinion that the findings of the Board, as recited, are, as a matter of law, insufficient to create a joint employer relationship with respect to the employees in said unit; but that, on the contrary, said findings establish as a matter of law that Floors, Inc., is an independent contractor and, for the purposes of collective bargaining, its employees are not the employees of the plaintiff. (R. 61).

The basic fallacy in this reasoning is that it assumes that if it is determined that Floors stood in the relationship of an independent contractor with respect to Greyhound, the Board was precluded from establishing a bargaining unit based on a *joint employer* relationship between Greyhound and Floors. There is no basis in the statute or in the authorities for that assumption. The Board, in the decision here involved, has said, in effect, that even if it be assumed that Floors is an independent contractor, Greyhound maintains such a degree of common control over the particular employees in question as to warrant the conclusion that Greyhound and Floors are joint employers of those employees, and to warrant the establishment of a collective bargaining unit coextensive with that joint employer relationship.

---

<sup>1</sup> References are to the record in the Court below which has been certified to this Court.

Such an approach is clearly sanctioned by the Act. Section 9(b) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*) provides:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the *employer unit, craft unit, plant unit, or subdivision thereof . . .* [Emphasis added.]

In Section 2(2), the Act defines "employer" to include "any person acting as an agent of an employer, directly or indirectly."

With that aspect of the definition of "employer" in mind, the Board has for many years directed elections in bargaining units comprising more than one company, even though the companies may be separate legal entities, or stand in the relationship of principal and independent contractor, where there is a substantial degree of common control over essential elements of the employment relationship of the employees in the bargaining unit.

One example of this approach can be found in a line of Board decisions in representation cases involving department stores which lease certain of their departments to a separate and independent enterprise. Where the facts demonstrate that the firm which owns and operates the store maintains a substantial degree of control over some of the critical aspects of the employment relationship, even though in other respects the lessees retain complete control, the Board has found both the store operator and the lessee to constitute joint employers, and has directed elections, exactly as it did here, in a unit of the employees who are subject to that joint control.

*e.g. Franklin Simon & Company, Inc. and Kayport Newport, Inc., 94 N.L.R.B. 576.*

*Macy's San Francisco and Seligman and Latz, Inc., 120 N.L.R.B. 69.*

In like fashion the Board has consistently established a single, multi-employer bargaining unit comprised of several otherwise wholly independent companies which, by a history of formal or informal participation in joint collective bargaining, have demonstrated a common control over the employment relationship.

e.g. *Associated Shoe Industries of Southeastern Massachusetts, Inc.*, 81 N.L.R.B. 224.

*Bunker Hill & Sullivan Mining & Concentrating Co.*, 89 N.L.R.B. 243.

*Research Craft Manufacturing Corp.*, 129 N.L.R.B. 723.  
*Molinelli, Santoni & Freytes*, 118 N.L.R.B. 1010.

The question of whether the term "employer," as that term is defined in the Act, may embrace more than one independent entity has frequently arisen in cases posing the issue of the liability of one company which has engaged in conduct affecting the employees of another company which, if committed by the other company, would constitute an unfair labor practice against those employees.

Such was the issue presented in *West Texas Utilities Company*, 108 N.L.R.B. 407. In that case, West Texas had contracted with Southwest Electric Company for some work to be performed at a power plant operated by West Texas. Southwest was required by its agreement with West Texas to furnish materials and labor, although West Texas reserved the right to require Southwest to "remove any employee from the work." West Texas was instrumental in having Southwest remove one Ray, an employee of Southwest, from the project under circumstances in which the Board found that Ray had been discriminated against because of his union activity. In ruling that West Texas was responsible for the unfair labor practice, the Board said:

Moreover, we find that under the contractual relationship of the parties, the Respondent was an employer of Ray, within the meaning of Section 2(2) of the Act, which provides, in part, that "the term 'employer' includes any person acting as an agent of an employer, directly or indirectly." The Respondent con-



tends, and we agree, that the relationship of Southwest to the Respondent was essentially that of an independent contractor. Normally, under such an arrangement, responsibility for the hire, pay, and discharge of employees on the job would be vested in Southwest. Notwithstanding, in the present case an important part of the responsibility was delegated to the Respondent in the contractual clause which authorized the Respondent, in its discretion, to control the tenure of Southwest's employees on the project. We conclude that in practical effect Southwest thereby designated the Respondent to act as its agent with respect to preventing or terminating the employment of any person who worked on the project. We accordingly find that the Respondent, in preventing Ray from being employed on the project, was acting as the agent of Southwest and is therefore responsible for the resultant unlawful discrimination.

Finally, in our opinion, the relationship between Southwest and the Respondent could alternatively be viewed as that of dual employers insofar as the hire and tenure of employees on the project was concerned, with Southwest having the primary right to hire and discharge and the Respondent having the contractual right to veto Southwest's determination in these matters. Thus, the Respondent controls to a substantial degree a most significant aspect of the employment relationship of persons on the project and we believe that it is an employer at least of persons, like Ray, over whom it effectively exercises such control. 108 N.L.R.B. at 413-414. (Emphasis added)

The Court of Appeals for the Fifth Circuit, the Court below in the instant matter, enforced the decision and order of the Board in a *per curiam* opinion, *N.L.R.B. v. West Texas Utilities Company*, 218 F. 2d 824 (C.A. 5), cert. denied, 349 U.S. 953. In so ruling, the Court acted in accord with two earlier decisions by that Court. In *N.L.R.B. v. Calcasieu Paper Company*, 203 F. 2d 12, 13 (C.A. 5), the Court enforced an order of the Board, noting, with approval, that:

Although the respondent companies are legally separate and distinct, the Board found that they constituted a single employer for the purposes of the Act.

A similar order of the Board was enforced by that Court in *N.L.R.B. v. Concrete Haulers, Inc.*, 212 F.2d 477, 479 (C.A. 5), where the Court stated:

The evidence is clear that the two respondents constitute one employer within the meaning of the National Labor Relations Act. Where, in fact, the production and distribution are one enterprise, that enterprise as a whole is responsible for compliance with the Act, regardless of the corporate arrangements between themselves. The interdependence and integrated nature of the operations of the respondents, the common ownership of the stock, and the fact that the same officer administers a common labor policy, clearly indicate that there is only one employer for the purposes of this Act. *N.L.R.B. v. Condenser Corporation*, 3 Cir., 128 F.2d 67.

It will be noted that in *Concrete Haulers* the Court enforced, *inter alia*, an order of the Board directing the joint employers to bargain in a unit co-extensive with the joint employer relationship.

In the *Condenser* case cited by the Court below in *Concrete Haulers*, the Court of Appeals for the Third Circuit, stated the proposition in these terms (128 F.2d at 71):

Under these circumstances we believe the relationship of these two corporations is such that an order pursuant to the provisions of the statute is proper against both, in view of the careful limitation which the Board has made with regard to the discharges. This is in no sense a penalty against the parties for an arrangement which is deemed by them to be in the interests of efficiency. It simply rests on the premise that where in fact the production and distribution of merchandise is one enterprise, that enterprise, as a whole, is responsible for compliance with the Labor Relations Act regardless of the corporate arrangements of the parties among themselves. What is important for our purpose is the degree of control over the labor relations in issue exercised by the company charged as a respondent. *Press Co., Inc. v. National Labor Relations Board*, 1940, 73 App. D.C. 103, 118 F.2d 937. Regardless of what Cornell says concerning its connection with Condenser's employees it appears that "to-

gether, respondents act as employers of those employees . . . and together actively deal with labor relations of those employees." *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 1938, 303 U.S. 261, 263.

See also: *N.L.R.B. v. Gibraltar Industries, Inc.*, — F. 2d —, 51 L.R.R.M. 2029 (C.A. 4).

Manifestly, therefore, the Board, having found that Greyhound and Floors exercise common control over the employees sought to be represented in this proceeding, acted properly and in accord with well established precedent in ruling that Greyhound and Floors were joint employers of these employees and in directing an election in an "employer" unit which embraced such of the employees of these two companies as are subject to this common control. The District Court and the Court below ignored the statutory provisions and precedents discussed above, and erred in concluding that an election on the basis of the joint employer relationship may not be directed if the facts show that Floors was an independent contractor.

What remains is the question of whether the Board acted reasonably and on the basis of evidence in concluding that there was "common control over the employees sought." Amalgamated submits that on that score the Board was correct beyond any possible doubt. The "short form" decision of the Board only sets forth some examples of the wealth of evidence in the record before the Board in support of that conclusion. What is set forth is sufficient to sustain that conclusion. However, should there be any doubt, Amalgamated will, in what follows herein, summarize the uncontroverted evidence that was before the Board showing the relationship between Greyhound and Floors as it affects the employees involved in this case.<sup>2</sup>

<sup>2</sup> In the summation of the evidence which follows, references designated "RB" are to the transcript of the testimony before the Board in this proceeding. This transcript is not now before this Court as part of the record certified to the Court. However, if this Court reaches this issue, and if it believes it necessary to review the

In this case Amalgamated sought a unit comprised of all porters, janitors, and maids employed at the bus terminals operated by The Greyhound Corporation (Southern Greyhound Lines Division) in Miami, St. Petersburg, Tampa, and Jacksonville, Florida.

In the operation of its interstate bus system, Greyhound maintains a number of terminals at which, in addition to ticket agents, baggage agents and related classifications, Greyhound utilizes the services of personnel classified as porters, janitors, and maids. (R.B. 118.)

Amalgamated represents, with a few exceptions, all of the drivers, maintenance employees, and terminal employees, of Greyhound. The current collective bargaining agreement between Greyhound and Amalgamated covers all of these classifications, and specifically covers the classifications of porters, janitors and maids. (R.B. 16-17, 19-20.) Thus, Amalgamated presently represents all porters, janitors, and maids at all of the terminals operated by Greyhound other than the four that are involved in this proceeding. (R.B. 231-233.)

In the case of the four terminals here involved—the terminals in Miami, St. Petersburg, Tampa, and Jacksonville—Amalgamated had represented the porters, janitors and maids as part of its overall unit until the time, commencing in 1954, when Greyhound entered into contractual arrangements with Floors to have the porter, janitor and maid work in those terminals performed by employees on the payroll of Floors. (R.B. 23.)

Floors is a wholly owned subsidiary of a Georgia corporation, engaged in the business of providing a great variety of building cleaning, maintenance, and allied services. (R.B. 240-246.)

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record on which the Board's decision was based, a certified copy of that transcript has been lodged with the Clerk of this Court as an appendix hereto. Much of the evidence—particularly the actual agreement between Greyhound and Floors—is in the record now before the Court.



The history and details of the contractual arrangements between Greyhound and Floors pertaining to the four terminals involved can be summarized as follows:

1. On November 11, 1954, these parties entered into a written agreement<sup>3</sup> with respect to the terminal in Jacksonville. In that contract:

(a) Floors agrees to "provide and perform twenty-four (24) hour daily janitorial and loading services" at the terminal in question "in accordance with the description and definition of work" set forth in a statement (designated as "Schedule A") attached to the agreement. That statement describes in minute details just what cleaning services will be performed, and specifically notes that the daily cleaning services would be repeated as needed for proper results "by discretion of contractor . . . and in agreement with the *Terminal Management*," i.e., in agreement with Greyhound. [Emphasis added.] (R. 18, 23)

(b) So far as the porter work is concerned, the statement attached to the schedule provides that Floors will supply "supervised labor, in uniform *approved by the Terminal Management*, in total amounts of man-hours daily to accomplish the normally practiced services in the Greyhound Bus Terminal" involving the handling of all baggage and express shipments, the loading and unloading of buses, and certain duties in connection with the servicing and cleaning of buses. [Emphasis added.] (R. 24)

(c) The contract provides for a minimum number of man-hours that will be supplied by Floors; but, more than that, it sets forth in the attached "Schedule A," a specific schedule of *individual assignments* of the employees to be supplied by Floors, *stating just what hours those employees will work each day and what their days off will be*. What is more, it provides that any changes in that schedule are "subject to the approval of the *Terminal Management*."

<sup>3</sup> The terms of this agreement are set forth in the instant Record at pp. 17-26.

[Emphasis added.] This point is further emphasized in the body of the agreement (Section 2) which states that Floors agrees "that all work provided for herein shall be performed *on schedule to the satisfaction of the terminal management.*" [Emphasis added.]

(d) Greyhound, in that first agreement, agreed to pay Floors a flat sum, payable weekly, with the understanding that the stipulated amount would be reduced proportionately if there were any reductions in the man-hours per week below the agreed upon minimum established by Schedule A. Then, plainly recognizing that the agreement between the parties was really one for the supplying of specific hourly labor, the agreement provided (in Section 5) that Floors would keep detailed cost records and after a period of experience would "*promulgate an hourly rate for services performed*" to be offered for acceptance by Greyhound if it results in lesser cost than the flat weekly compensation.

(e) The agreement is *terminable by either party at will by thirty days' written notice*, with the further right of Greyhound to terminate without any notice "if unforeseen difficulties arise due to the existence of labor contracts." (R. 20)

2. On March 3, 1956 Greyhound and Floors entered into an amendment<sup>4</sup> of the 1954 Jacksonville agreement. In that contract:

(a) The schedule of hours of work to be supplied by the employees provided by Floors was changed "in fulfillment of said altered schedule as set forth this date *by the Terminal Manager of the Jacksonville Greyhound Terminal.*" The parties then reaffirmed their agreement that the schedule of hours worked "*shall be increased or decreased by direction of the Terminal Manager, only,*" and provided for a specific hourly rate that would apply with respect to any increase in regularly scheduled hours over and above the agreed upon minimum that the terminal manager of Grey-

<sup>4</sup> This amendment is set forth in the Record. (R. 26-29.)

hound might authorize. [Emphasis added.] (R. 27)

(b) The parties then dealt with the problem of using the employees involved on overtime work. They were very specific in providing that all hours of overtime work "*shall be directed to be used, affected and operated as such by the Jacksonville Greyhound Terminal Manager, only.*" Not only did the parties agree that Greyhound would control the amount of overtime that would be worked; they even provided in the agreement for the precise premium that would be paid to any employee working overtime (see Section D, 1, (a) and (b)), and they provided (in Section E) that the approval of overtime by Greyhound would be in terms of *specific employees*. [Emphasis added.] (R. 27, 28)

3. On September 28, 1956,<sup>4</sup> Greyhound and Floors further amended their agreement with respect to the Jacksonville terminal. In that amendment the parties changed the method of compensation to what they termed a "cost-plus arrangement." Actually, however, it is clear that this is not a cost-plus arrangement in the usual sense of the term in which the contractor bills for all actual costs incurred, plus an agreed-upon percentage over and above those costs. Here, the agreement of September 28, 1956 (which must, of course, be read in the light of those provisions in the earlier agreements that were not modified), provides for a fixed maximum payment to be made by Greyhound for *each element* of the cost *including labor*. Thus, the agreement provides that the maximum weekly amount that is guaranteed is \$1,519.52, of which 72 per cent represents the charge for labor, and any deviations from that guaranteed amount must conform to the percentage progressions. *Only such labor cost as is authorized by Greyhound may be charged for*, and above that Floors adds 28 percent for overhead and profit.

Here we have one of the most significant facts in this case, for this is the picture that emerges when we look at the

<sup>4</sup> This amendment is set forth in the Record before this Court at pp. 30-35.

contractual arrangement involved: Greyhound, by having to approve the work schedules, determines the number of porters, maids, and janitors that will be employed. Greyhound determines the minimum number of hours that these employees will work, and the extent to which any of them will work overtime. Greyhound determines the maximum it will pay for the total of all hours worked. As a result, in the clearest possible way, *Greyhound and not Floors, determines the wages of the employees we are concerned with in this case.*

4. On November 13, 1957,\* Greyhound and Floors entered into an agreement to provide the same kind of services in the Miami terminal. In that contract the parties agreed to terms identical to those established with respect to the Jacksonville terminal. Plainly indicating the continuation of the principle that Greyhound fixes the work schedule of the particular employees involved is the statement in the letter from Greyhound to Floors that (R. 35-36):

We further agreed that you would have one of your representatives meet me in Miami on November 22 to set up the work shifts and that it would be impossible to draw up a contract until we had worked our work shifts out and know the exact number of employees or manhours that you would have to furnish us.

The letter further makes it clear that the amount that Greyhound will pay to Floors will be directly related to the wage rate that Floors will pay to the employees involved. No profit is to accrue to Floors by being able to obtain labor at a rate less than it then anticipated; such savings are to be passed on directly to Greyhound. (See the fourth paragraph of the letter agreement of November 13, 1957.)

Finally, the agreement makes it clear that the Miami agreement, like the one in Jacksonville, is to be *terminable at will*.

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\* This agreement is set forth in the Record before this Court at pp. 35-36.



5. On January 24, 1958, Floors and Greyhound entered into an agreement applicable to the terminals in Tampa and St. Petersburg on exactly the same terms as those which were agreed to in the case of the Jacksonville and Miami terminals.<sup>7</sup>

Many of the porters, janitors, and maids now employed in the four terminals in question and covered by the instant petition are the same individuals who were employed before their work was "transferred" to Floors. (R.B. 148, 214, 224, 227-228.) And it is undisputed that the work of porters, janitors, and maids in these four terminals has continued to be performed in precisely the same manner as it had been done before, and as it continues to be done in all of the other terminals of Greyhound. (R.B. 34, 209, 276.)

The porters, janitors, and maids here involved punch the same time clock as is used by other Greyhound employees. (R.B. 101, 158, 222.) They wear uniforms identical in appearance to that worn by comparable employees of Greyhound in the other terminals except for the fact that they have very recently been required to add the insignia "Floors Inc. of Florida" to their shirts. (R.B. 62, 153.) Despite that additional designation, many of the porters continue to wear Greyhound insignia on their caps, a fact known to representatives of Floors and of Greyhound. (R.B. 62-63, 170.) Employees in the four terminals in question here supply their own uniforms, which is also true of porters, janitors, and maids in all other terminals operated by Greyhound. (R.B. 61, 152, 170.)

It is self-evident, and amply supported by the record, that the work performed by all of the employees covered by this petition comprises an *integral and essential part of the business of Greyhound*. The operator of an interstate bus system may or may not provide restaurant service in its terminals. It may or may not provide lockers, or a newsstand, or pin ball machines in its terminals. It may or may not

<sup>7</sup> This agreement is set forth in the Record before this Court at p. 37.

provide a pillow service for the passengers on its buses. But it *must* provide a terminal that is kept presentable; it *must* load and unload the baggage of its passengers which it *must* carry; and it *must* load and unload the express shipments, newspapers, etc., which are shipped by its freight customers, and which it *must* accept for shipment. This is not only a matter of sound business judgment; it is required by the laws and regulations under which a bus system such as Greyhound operates. (R.B. 32-33, 106-111.)

What is more, as the record also clearly establishes, passengers or shippers who have claims for damage to baggage or express shipments look to *Greyhound* and not to *Floors* for recovery. *Floors* carries no insurance to cover such claims; Greyhound accepts all responsibility in that area. Greyhound recognizes that it is still responsible and it makes no effort to advise any passengers or express customers that their baggage and express is being handled in Miami, Tampa, St. Petersburg or Jacksonville by employees with any different status than that of the porters in any other terminals. (R.B. 30-31, 91, 126, 127-129.) It stands to reason that when a passenger deals with a porter in one of those four terminals he assumes that he is dealing with a *Greyhound* porter. He is in a *Greyhound* terminal. He knows nothing of an entity known as "*Floors, Inc.*" and he looks to *Greyhound* for the service he expects. (R.B. 278-279.)

Under these circumstances, it is reasonable to expect to find that in the four terminals where it has contracted with *Floors*, Greyhound retains complete, specific, and detailed control over the manner in which the work performed by the personnel supplied by *Floors* is performed. And that is precisely what obtains. We have already seen above how the basic written agreements between Greyhound and *Floors* give Greyhound complete control over the number of employees that will be utilized, the shifts they will work, the overtime that will be worked, and the wages that will be paid. The record demonstrates that in practice that control

is in fact exercised. The Greyhound terminal managers determine the exact number of employees that will be used on each shift; they must approve of any overtime payments or the use of extra help (R.B. 30, 44-45, 53-55, 75, 99-100, 114, 123-125, 131-132, 160-163); and the president of Floors admitted at the hearing that *he would have to obtain the approval of Greyhound before he could give his employees working in the Greyhound terminal a wage increase.* (R.B. 252-253.)

Nor is that control limited to matters affecting the number of employees and their compensation. Floors has a supervisor in Miami, in Jacksonville, and one who covers both Tampa and St. Petersburg; but in each instance that supervisor is also responsible for the supervision of other Floors projects; in no instance is he present in the Greyhound terminal at all times; and the record shows that several days may pass in which the Floors supervisor is not present in the Greyhound terminal at all. (R.B. 87, 88, 147, 211-212, 218, 277.) But more important is the fact that Greyhound, despite its agreement with Floors, regards the Greyhound terminal manager as the boss of the terminal, responsible in every way for the work performed by all employees in the terminal whether they are paid by Greyhound or paid by Floors. In that connection, the ranking Greyhound official testified at the hearing as follows:

"Q. Well, let's examine into this supervisory business. Do they [the Greyhound Terminal Managers] concern themselves at all with how the baggage is handled and how the express is handled and what procedures and so forth will be followed?

"A. Certainly if the job is not being handled properly they concern themselves with it because they are still managers of the terminal.

"Q. Right, do they instruct Floors, Incorporated, as to how they want that work done?

"A. They do, Floors, Incorporated, supervisors.

"Q. Do they tell them specific details as to how that work will be done?

"A. Why sure." (R.B. 35.)

Greyhound makes no distinction in the standard of conduct, or in the details of performance, that it expects of the personnel supplied by Floors as compared to that of other identical employees in the other terminals that it operates. (R.B. 8-70.) As evidence of the fact that Greyhound maintains complete control over the way in which the work is done by personnel supplied by Floors, the record shows:

1. That the Greyhound terminal managers give, orally or in writing, specific and detailed instructions to the Floors supervisors as to how they want the work done and what changes they want in the manner in which the job is done. When written instructions are issued by the Greyhound terminal managers, the Floors supervisors post them, and the porters, janitors, and maids are expected to read and comply with those instructions. (R.B. 88-89, 93-99.) A review of the examples of specific instruction set forth in the cited record references readily demonstrates that they cover not just the end result but the precise manner in which the end result is to be achieved.

2. That all parties understand that where there is a conflict between any instructions the terminal manager has issued and any the Floors supervisor has promulgated the employees are expected to comply with the instructions of the Greyhound terminal manager. (R.B. 60-61, 112, 148-151.)

3. That on many occasions—particularly, of course, when the Floors supervisor is not present—the employees in question receive their instruction and supervision directly from the terminal managers or from other Greyhound employees. (R.B. 105, 116-117, 199-201, 210-211.) As one Greyhound official testified: "Of course, we are in the business of handling passengers and somebody would have to tell that Floors' porter what to do." (R.B. 59.)

4. That the Greyhound terminal managers have the authority (and have exercised the authority) to order Floors to remove an employee that they consider undesirable and no longer wish to have employed in the terminal. On no occasion has such an order been refused. (R.B. 36, 90-92, 177,



193.) In the same manner, Greyhound terminal managers have the authority to refuse to permit Floors to hire an employee it considers undesirable for employment in any of the Greyhound terminals. (R.B. 36-37.)

On the record before the Board, as summarized above, the finding by the Board that Greyhound and Floors exercise common control over the employees involved is more than justified. Indeed, it is the minimum that the Board could find. For, on that record, we submit that the Board would have been eminently justified in concluding that Floors was not an independent contractor,<sup>8</sup> and that Greyhound was the real employer of the employees involved. The Court of Appeals for the Fifth Circuit, in accord with well established precedent, has noted that:

It is generally stated in the authorities that the distinction between an independent contractor and an employee is found in the nature and the amount of control reserved by the person for whom the work is done. And that an employment relationship exists "whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished . . ." *N.L.R.B. v. Steinberg*, 182 F.2d 850, 855 (C.A. 5).

It would be difficult to conceive of a case in which the person for whom the services are performed retains more complete control over the manner in which the work is performed. In its arrangement with Floors, Greyhound has done no more than add a level of routine supervision over the porters, maids and janitors that did not exist before.

<sup>8</sup> The decision in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO, v. Greyhound*, 231 F. 2d 585 (C.A. 5), does not require a different result. The sole issue in that case was whether Greyhound had violated its agreement with Amalgamated by entering into the contract with Floors. The issue of whether Floors was an independent contractor within the meaning of the Act had not been litigated in the lower Court, and the facts which show the extent to which Greyhound controls not only the end result but the means by which that result is accomplished had not then been known.

The fact that the work involved is an on-going, integral part of Greyhound's business and not just an incidental related aspect, the fact that the work is done on the premises of Greyhound and integrated with the work of other Greyhound employees, the fact that the work is identical to that performed in other Greyhound terminals and is the same as was done by these employees while on Greyhound's payroll, the fact that Greyhound determines the number of employees that are used, the shifts they will work, and the amount of overtime that will be worked, the fact that Greyhound retains the right to prohibit Floors from employing in its terminals any particular employees Greyhound does not desire, the fact that Greyhound effectively determines what wages will be paid to the employees, leaving to Floors not a risk-type profit, but a fixed fee for overhead and administration, the fact that Greyhound continuously instructs Floors supervisors as to the most minute details concerning the performance of the work with the understanding that those instructions will be conveyed to the employees, the fact that Greyhound officials themselves have frequent occasion to directly supervise the work, particularly on the regularly occurring instance when Floors supervisors are not present, and the fact that the contract between Greyhound and Floors is terminable at will—all these lead inescapably to the conclusion that Greyhound retains that degree of control over the means and manner in which the result is accomplished which negates any independent contractor relationship.

Amalgamated commends to the attention of this Court a well reasoned District Court opinion in a case involving the contracting out of terminal work by a sister subsidiary of the Greyhound Corporation. In *Walling v. Southwestern Greyhound Lines*, 65 F. Supp. 52, the Court dealt with an alleged violation of the Fair Labor Standards Act by an individual (A. F. Sink) with whom Southwestern Greyhound had entered into an agreement for the operation of one of its terminals. Southwestern Greyhound disclaimed

any liability on the ground that Sink was an independent contractor and that the terminal employees involved were employees of Sink and not of Southwestern Greyhound. On facts which are certainly no more persuasive than those involved here, the Court rejected this contention and found that Sink and his employees were employees of Greyhound under the very same common law test that is applicable here. The Court said (65 F. Supp. at 55):

From the facts above stated no conclusion can be reached other than that Sink is an *employee of defendant and not an independent contractor*. Notwithstanding the broad definition of an "employee" within the meaning of the Fair Labor Standards Act, under such facts, Sink is an employee of defendant *even when measured by the standards of the common law*. Under its contract with Sink defendant had the "right to control" Mr. Sink as to the details of the duties performed by him in the operation of its depot. Its District Passenger Agent and Auditor make recommendations and gave to Mr. Sink orders concerning the conduct of the business at the depot. In its contract defendant specifically retained "control of expenses" incurred in the operation thereof. Defendant provided the means by which Mr. Sink and the other employees at the depot perform their duties. *The occupation, in which Mr. Sink and said other employees were engaged, was not distinct in character, separate and apart from defendant's general interstate business but was an integral and essential part thereof.* The occupation of Mr. Sink was one that is usually performed by a Station Master and required no particular skill. Defendant furnished and supplied the instrumentalities and the place where such duties were performed. The method of paying Mr. Sink's compensation and the term of his employment were continuous. He was not paid by the job nor for specified duties; *he was paid to operate the station in accordance with the usage and custom of defendant's public carrier business and all of his activities and duties, as well as those of the other employees at said depot, were amenable to the custom and control defendant exercised over its entire inter-*

**state business.** Defendant's tariffs and its operating schedules were dependent, in part, on the duties performed by Mr. Sink and the other employees at said depot. Under such circumstances Mr. Sink is and was an employee of defendant under the common law. *Skidmore v. Haggard*, 341 Mo. 837, 110 S.W. 2d 726; *Barnes v. Real Silk Hosiery*, 341 Mo. 563, 108 S.W. 2d 58; *State ex rel Chapman v. Shain*, 347 Mo. 308, 147 S.W. 2d 457; Restatement of the Law of Agency, Vol. 1, p. 483. Mr. Sink, being an employee of defendant under common law standards determining that relationship, there can be no question that he is an employee of defendant within the meaning of the Fair Labor Standards Act. *National Labor Relations Board v. Colten*, 6 Cir. 105 F. 2d 179; *National Labor Relations Board v. Blount*, 8 Cir. 131 F. 2d 585; *Southern Ry. Co. v. Black*, 4 Cir. 127 F. 2d 280. [Emphasis added.]

The Board could well have found that Floors was not an independent contractor with respect to the particular employees here involved. *A fortiori*, it acted reasonably and properly in determining that Greyhound and Floors exercise such a degree of common control as warrants treating the two companies as joint employers of these employees, and justifies the establishment of a collective bargaining unit coextensive with that joint employer relationship.



**CONCLUSION**

We respectfully submit that, for all of the reasons stated in the Petition, a writ of certiorari should issue in this cause, and the decision of the Court below should be reversed on the jurisdictional ground urged in the Petition. If, however, this Court should rule that the Court below did not err in affirming the jurisdiction of the District Court, we submit that it should then rule, for the reasons stated in this brief, that the Court below erred in concluding that the Board had exceeded its statutory authority in directing the instant election.

Respectfully submitted,

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IN THE

# **Supreme Court of the United States**

October Term, 1963

**No. 77**

**HAROLD A. BOIRE, REGIONAL DIRECTOR, TWELFTH  
REGION, NATIONAL LABOR RELATIONS BOARD,**  
Petitioner,

versus

**THE GREYHOUND CORPORATION,**  
Respondent.

**Brief in Opposition to Petition for a Writ of Certiorari to  
the United States Court of Appeals for the Fifth Circuit**

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1962

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No. 844

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HAROLD A. BOIRE, REGIONAL DIRECTOR, TWELFTH  
REGION, NATIONAL LABOR RELATIONS BOARD,  
Petitioner,

versus

THE GREYHOUND CORPORATION,  
Respondent.

---

Brief in Opposition to Petition for a Writ of Certiorari  
to the United States Court of Appeals for the Fifth Circuit

---

**STATUTES INVOLVED**

In addition to the statutory provisions set forth in Appendix B, pages 28-29, of the petition, respondent sets forth additional relevant statutory provisions in Appendix A of this brief (infra, p. 25). 19-21).

**STATEMENT OF THE CASE**

The respondent deems it necessary to make the following statement in order to correct inaccuracies and omissions in the statement of the petitioner.

### a. The Representation Proceeding

The Greyhound Corporation (plaintiff in the District Court, appellee in the Court of Appeals, and respondent herein, and referred to herein as Greyhound or respondent) is a Delaware corporation engaged in interstate motor carriage. (R 1)<sup>1</sup> and operating terminal facilities at numerous locations, including Jacksonville, Miami, Tampa, and St. Petersburg, Florida (R 29). Floors, Inc., of Florida (hereinafter referred to as Floors) is a Florida corporation and a wholly-owned subsidiary of Floors, Inc., of Georgia. Floors is engaged in the business of furnishing cleanup, building maintenance, and other allied services to varied customers throughout Florida, including the four Greyhound terminals referred to above (R 45). Of the more than 500 persons employed by Floors in Florida, only 63 work part or full time at Greyhound terminals in Florida (R. 45).

Floors furnishes its services on a fixed price or cost-plus basis to all customers (R 46). Greyhound and Floors have no common identity, are not a single or joint entity, have no common directors, stockholders, or officials, and there is no mutuality of operating control (R 5, 51).

On April 17, 1961, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO (hereinafter referred to as the Union), filed a petition with the National Labor Relations Board (hereinafter referred to as the Board), seeking to be certified as

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<sup>1</sup>R refers to the Record on Appeal as printed for use in the Fifth Circuit and filed by petitioner. P refers to the Petition for Writ of Certiorari.

the representative for collective bargaining for "all porters and maids located in the Greyhound Corp. bus terminals at Miami, St. Petersburg, Tampa and Jacksonville, Florida." Said petition gave the name of the employer as "Floors, Inc." On May 25, 1961, the Union filed an amended petition, seeking to represent the same unit described in the original petition, and gave the name of the employers as "Southeastern Greyhound Lines, and Floors, Inc.". These two petitions were attached to the Regional Director's motion to dismiss and alternative motion for summary judgment, but were not included in the Record on Appeal. However, said petitions are referred to in the decree of the District Judge (R 67).

By Decision and Direction of Election dated May 3, 1962 (R 10-13), the Board directed its Regional Director (defendant in the District Court, appellant in the Court of Appeals, and petitioner herein) to conduct an election no later than 30 days from May 3, 1962 (R 12) among:

"All porters, janitors and maids working at the Greyhound Corporation's bus terminals in Miami, St. Petersburg, Tampa and Jacksonville, Florida, excluding all other employees of the Greyhound Corporation and Floors, Inc. of Florida." (R 11)

The Board's decision found both Greyhound and Floors to be the "joint employer" of the persons in the above described unit (R 11, 12). In support of this conclusion, the Board found:

"It appears that Floors hires, pays, disciplines, transfers, promotes and discharges the porters,



janitors and maids. However, it also appears that Greyhound's terminal managers confer with Floors' supervisors in setting up work schedules and in determining the number of employees required to meet those schedules. Moreover, it also appears that Floors' supervisors may visit the Greyhound terminals on an irregular basis and on occasion may not appear for as much as two days at a time; and that the employees sought, including porters in handling baggage, receive work instructions from Greyhound terminal officials. In addition, the record also shows that Greyhound, on one occasion, prompted the discharge of a porter whom it felt to be an unsatisfactory employee. In view of the common control over the employees sought, we find both Greyhound and Floors to be their joint employer." (R 11, 12).

There is no finding that Greyhound has any right, control, or authority to bargain collectively with the persons in the unit "in respect to rates of pay, wages, hours of employment, or other conditions of employment." (Section 9 (a) of the Act, P 26)

Member Rodgers dissented, stating:

"On the basis of the record herein, I would find that the employees sought are employees of Floors, that Floors is an independent contractor, and that the only appropriate unit is one comprised of all of Floors' employees in the above-described localities. Accordingly, I would dismiss the petition." (R 12)

Following the Board's Decision and Direction of Election, petitioner proceeded to arrange for the election on either May 28 or May 29, 1962, but no later than June 1, 1962 (R 13-17).

#### b. The Instant Action

On May 24, 1962, Greyhound filed its complaint and supporting exhibits (R 1-44), seeking an injunction against the effectuation of the Board's Decision and Direction of Election by the Board's Regional Director, on the grounds, inter alia, that the said Decision and Direction of Election was in excess of the Board's delegated powers, contrary to the provisions of the National Labor Relations Act, as amended, and violative of respondent's rights under the Act. The said action was not one to review an alleged erroneous decision of the Board, but was an initial action pursuant to 28 USC 1337 (infra, p. 19). The complaint attacked the validity of the Board's Decision and Direction of Election on its face. The transcript of the representation hearing was not filed in the cause by either party, the complaint not being one for review or to correct an alleged error.<sup>2</sup> Essentially, the complaint was predicated upon the fact that the Board's Decision and Direction of Election showed on its face that the Board's own findings of fact conclusively evidenced action of the Board in excess of its delegated powers and contrary to the provisions of the Act.

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<sup>2</sup>It is noted that the Union's motion to file an amicus curiae brief and the brief appended to said motion cites from and argues at length with reference to the transcript of the representation proceedings. Should the Union's motion be granted, all references to that transcript are impertinent and immaterial, because said transcript was not a part of the record in either the District Court or in the Court of Appeals.

The Regional Director filed a motion to dismiss and, in the alternative, a motion for summary judgment without supporting affidavits, although respondent's complaint for injunction was supported by affidavits.

After having issued a temporary restraining order (R 52), and a 10-day extension of that order (R 58-60), and after hearing, the District Judge issued his final decree for permanent injunction and memorandum opinion (R 60-69). The District Judge held that the findings of the Board, as recited, are, as a matter of law, insufficient to create a joint employer relationship with respect to the employees in the described unit (R 61). The Court's order denying the petitioner's motions was predicated upon express findings and conclusions that, inter alia, Section 9 of the Act expressly contemplates representation proceedings only as regards the employer of the employees comprising the unit found to be appropriate by the Board (R 62); it is impossible to comprehend how an employer could bargain in good faith about wages with employees who are not paid by said employer and over whom the said employer cannot exercise the power of hiring or firing (R 62); the case is controlled by the decision of this Court in *Leedom v. Kyne* (1958), 358 U. S. 184 (R 62); the Board has acted in excess of its delegated powers (R 62, 63); and the matter involved in the cause does not involve a review of an erroneous decision of the Board, but rather involves an at-

tack on the action taken by the Board, which it is not authorized to take under the statute (R 64).<sup>3</sup>

### REASONS WHY THE WRIT SHOULD BE DENIED

The question presented has been settled by the Court in *Leedom v. Kyne* (1958), 358 U. S. 184; the decision of this Court in *Leedom v. Kyne*, *supra*, is not in conflict with the decision of the Court of Appeals; the decision of the Court of Appeals is not in conflict with any decision of another court of appeals on the same matter; and the decision of the Court of Appeals raises no question of great importance to the future administration of the National Labor Relations Act, as amended, which has not been settled by this Court in *Leedom v. Kyne*, *supra*.

### ARGUMENT

1. In *Leedom v. Kyne* (1958), 358 U. S. 184, 185, this Court stated:

"The sole and narrow question presented is whether a Federal District Court has jurisdiction of an original suit to vacate that determination of the Board because made in excess of its powers."

<sup>3</sup>A summary of the District Judge's opinion as stated at R 61-62 is: "The Court is therefore of the opinion and finds that with regard to representation proceedings the Board is prohibited by the provisions of the National Labor Relations Act, as amended, from conducting a representation election wherein the plaintiff is a party-employer with regard to persons who, under the Act, are not its employees. The Court finds that Section 9 of the Act expressly contemplates representation proceedings only as regards the employer of the employees comprising the unit found to be appropriate by the Board."



In that case, the action was brought by a union president, individually and in his official capacity, seeking an injunction against the Board, on the basis that the Board had exceeded its statutory authority in refusing to direct a vote among professional employees to determine whether they wished to be included in a unit with non-professional employees. Section 9 (b) (1) provides that the Board shall not decide that any unit is appropriate for collective bargaining purposes, if such unit includes both professional employees and employees who are not professional employees, unless a majority of such professional employees vote for inclusion in such unit. The Board had included a few non-professionals in a professional unit and had declined to hold an election among the professional employees as required by Section 9 (b) (1) of the Act. The members of the Board filed a motion to dismiss and, in the alternative, for summary judgment. The plaintiffs moved for summary judgment. Defendants' motions were denied and plaintiffs' motion for summary judgment was granted.<sup>4</sup> This Court further stated, at 358 U. S. 188:

"The record in this case squarely presents the question found not to have been presented by the record in *A. F. of L. v. NLRB* (US) *supra*. This case, in its posture before us, involves 'unlawful action of the Board [which] has inflicted an injury on the [respondent].' Does the law, 'apart from the review provisions of the . . . Act,' afford a remedy? We think the answer surely must be yes. This suit is not one to 'review,' in the sense

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<sup>4</sup>*Kyne v. Leedom* (D.C. D.C. 1956), 148 F. Sup. 597; affirmed *Leedom v. Kyne* (D.C. Cir. 1957), 249 F. 2d 490; affirmed by this Court, *Leedom v. Kyne*, *supra*.

of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. Section 9 (b) (1) is clear and mandatory. It says that, in determining the unit appropriate for the purposes of collective bargaining, 'the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit.' (Emphasis added [by Court]) Yet the Board included in the unit employees whom it found were not professional employees, after refusing to determine whether a majority of the professional employees would 'vote for inclusion in such unit.' Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a 'right' assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given."

This Court did not make any finding which justifies a distinction between the right of an employer and the right of a union to obtain such relief. The minority of the Court, at 358 U. S. 195, construed the majority opinion as having the effect that "Both union and management will be able to use the tactic of litigation to delay the initiation of collective bargaining when it suits their purposes."

The instant case presents the same situation as was present in *Leedom v. Kyne*. The Board found that the employees of Floors were also the employees of Greyhound in spite of the fact that the Board's Decision and Direction of Election shows on its face, as a matter of law, that only Floors is the employer and that none of the indicia of an employment relationship exists between the employees and Greyhound. The petitioner argues that there is no prohibition in the Act which would deprive the Board of jurisdiction to make such a finding and continue its processes with regard to Greyhound. Section 2 (3) of the Act (*infra*, p. 20), when viewed, as it must be, in the light of the legislative history of that section, demonstrates quite clearly that the Board may not determine that a person is the employee of another, unless such other person employs the alleged employee for hire. The legislative history supporting this contention is unequivocal. Prior to the enactment of the Labor-Management Relations Act, 1947, the Board and this Court had given to the term "employee" a definition not limited to the accepted legal and dictionary definition of the term. In amending Section 2 (3), the Congress emphasized that the purpose of the amendment was to restrict the Board and the courts to the concept of the word "employee" as one who works for another for hire.<sup>5</sup>

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<sup>5</sup>The House Committee Report reads, in part, as follows: "An 'employee', according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board v. Hearst Publications, Inc.* (322 US 111 (1944)), the Board expanded the definition of the term 'employee' beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. In this case the

In *National Labor Relations Board v. Hearst Publications, Inc.*, (1944), 322 U. S. 111, this Court had affirmed the Board's determination that certain persons were employees and had relied upon the Board's expertise in so deciding. The alleged employees in that case did not meet either the common law or dictionary definition of "employee". As pointed out above, the expressed purpose of Congress was to prevent further such interpretations. *Hearst Publications, Inc. v. National Labor Relations Board* (9 Cir. 1943), 136 F. 2d 608, 611, is the decision reversed by this Court in the *Hearst* case, *supra*. In that case, the Ninth Circuit stated:

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Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees'. The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors.' 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertise, has approved, the bill excludes 'independent contractors' from the definition of 'employee.'" H. Rep. 245, 80th Cong., 1st Sess., p. 13. Vol. 1, Legislative History of the Labor-Management Relations Act, 1947, page 309. The Conference Report follows the House Committee Report. H. Rep. 510, 80th Cong., 1st Sess.; U.S.C. Cong. Serv. 80th Cong., 1st Sess., p. 1138.



"The National Labor Relations Board has no jurisdiction over a controversy between a newspaper publisher and its newsboys unless the latter are employees of the former."

The purpose of Congress was not simply to exclude "independent contractors" from the definition of the term "employee", but was to make sure that only persons who were actually "employees" of their own employer were covered by the Act with regard to representation proceedings.

Attempts to broaden the definition of the term "employee" beyond that contemplated by the Congress have been made based upon the language of Section 2 (3) of the Act, the first portion of which reads:

"The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise...."

Mr. Justice Roberts clearly disposed of this contention in his dissenting opinion in *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 136, 137, which is now the controlling law:

"It is urged that the Act uses the term in some loose and unusual sense such as justifies the Board's decision because Congress added to the definition of employee above quoted these further words: 'and shall not be limited to the employees of a particular employer, unless the Act explicitly

states otherwise, . . . The suggestion seems to be that Congress intended that the term employee should mean those who were not in fact employees, but it is perfectly evident, not only from the provisions of the Act as a whole but from the Senate Committee's Report, that this phrase was added to prevent any misconception of the provisions whereby employees were to be allowed freely to combine and to be represented in collective bargaining by the representatives of their union. Congress intended to make it clear that employee organizations did not have to be organizations of the employees of any single employer. But that qualifying phrase means no more than this and was never intended to permit the Board to designate as employees those who, in traditional understanding, have no such status."

The over-all legislative intent is likewise clearly expressed, insofar as representation matters are concerned, in Section 9 of the Act (P 26-27).

The Board derives its statutory authority in representation matters from Section 9 of the Act. That section clearly provides that a representation proceeding leading to election and/or certification is limited to a proceeding between the representative of "employees" and the "employer" of the particular "employees". Section 9 (b) of the Act provides that the Board shall decide in each case whether "the unit appropriate for the purposes of collective bargaining shall be *the employer unit, craft unit, plant unit, or subdivision thereof.*" (Italics added) (P 26-27). Section 9 (c) (1) (A) (infra, p. 21) of the Act provides for hearings

and elections with reference to the claim of employees that they wish to be represented by collective bargaining with "their employer". The usual effectuation of a Section 9 certification is the prosecution of an unfair labor practice case under Section 8 (a) (5) (*infra* p. 20), which provides "It shall be an unfair labor practice for an employer — (5) To refuse to bargain collectively with the representatives of his employees subject to the provisions of Section 9 (a)". (Italics added). The terms "employer" and "employee" are not defined in the Act except to the extent that Sections 2 (2) and 2 (3) specifically include certain employers and employees and specifically exclude certain employers and employees. In *Pittsburgh Plate Glass Company v. National Labor Relations Board*, 313 U. S. 146, at page 152, the Court defined the provisions of Section 9 (b) of the Act as follows:

"In accordance with this delegation of authority, the Board may decide that all employees of a single employer form the most suitable unit for the selection of collective bargaining representatives, or the Board may decide that the workers in any craft or plant or subdivision thereof are more appropriate." (Italics added).

As a matter of law, the employees of an independent contractor are not the employees of the principal engaging the contractor.\*

The lack of jurisdiction in the Board in the instant

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\**Greyhound Lines, Inc. v. Harrison* (7 Cir. 1946), 156 F. 2d 412, 414, affirmed 331 U. S. 704; *National Labor Relations Board v. Denver Building and Construction Trades Council* (1951), 341 U. S. 675, 689, 690.

case is no less present than in *Kyne*. The petitioner's argument that an employer should have no recourse to the courts, whereas unions may have such recourse, is founded upon no legal or equitable basis. When the Board has exceeded its statutory authority, it has no authority, and thus is wholly without jurisdiction. Being without jurisdiction, the Board may be enjoined from proceeding as if it did have jurisdiction. Greyhound's right in the instant case is no less a right than was *Kyne's* right in *Kyne*. The plaintiffs in both cases had the right to an injunction against the Board's deprivation of that right. Had the Board been acting in a quasi-judicial capacity (as in an unfair labor practice proceeding), a writ of prohibition would lie to prevent the attempted exercise of jurisdiction which was lacking. Where the acts of the Board are administrative, injunction is the appropriate remedy to prevent the exercise of acts outside the Board's jurisdiction.

Respondent again emphasizes that the judicial proceedings in the instant case did not seek a "review" of an alleged erroneous decision on the part of the Board, but sought relief against the Board from acting in excess of statutory authority and contrary to the command of a statute. The petitioner must look to the legislative history of Section 10 of the Act for limitations upon access of parties to the courts, because that section does not in terms provide that Section 10 review proceedings are normally exclusive. Likewise, the respondent looks to legislative history, as hereinabove set forth, to find the limitations placed upon the Board by the Congress with regard to who is and who is not an employee.

2. The holding of the Fifth Circuit that *Kyne* permits



a party to obtain relief from a federal district court against acts of the Board in excess of its statutory authority is not in conflict with the decision of any other court of appeals subsequent to *Kyne*. The petitioner rests his case upon the theory that an employer has an adequate remedy other than by injunction, but that a union does not. The argument is predicated upon the fact that the plaintiff in *Kyne* happened to be a union. The petitioner argues that the holding of the Fifth Circuit is in direct conflict with decisions of the Court of Appeals for the District of Columbia Circuit (P 10); and that the cases cited as conflicting are likewise in conflict with certain other decisions (P 11).

Petitioner cites *General Cable Corporation v. Leedom* (D. C. Cir. 1960), 278 F. 2d 237; *Atlas Life Insurance Co. v. Leedom* (D. C. Cir. 1960), 284 F. 2d 231; and *Norris v. National Labor Relations Board* (D. C. Cir. 1949), 177 F. 2d 26. In *General Cable* and *Atlas*, the subject matter was alleged inconsistency between the Board's actions and the Board's internal rules. There was a complete absence of any act in excess of statutory powers. In both cases, the court recognized the doctrine of *Kyne*. The issue of whether or not an employer could resort to a federal district court was not determinative. *Norris* preceded *Kyne* by 9 years. The plaintiff in that case desired to contest the union's representation of a substantial number of employees. The court found that this was merely an administrative determination for which investigative procedures existed.

Petitioner, in support of his contention of conflict between the courts of appeals, cites *Boyles v. Waers* (10 Cir. 1961), 291 F. 2d 791; *Consolidated Edison Co. v. McLeod* (2 Cir. 1962), 302 F. 2d 354. Again, both *Boyles* and *Consolidated*

involved claims that the Board was violating its own internal rules. The cases in no way decide that an employer may or may not resort to the courts. The same is true of the district court case cited by petitioner, *U. S. Pillow Corp. v. McLeod* (S.D.N.Y. 1962), 208 F. Supp. 337. In no case cited by the petitioner was the distinction between the rights of an employer and the rights of a union delineated.

By footnote (P 10), the petitioner also relies upon an alleged conflict represented by a decision of the Sixth Circuit, denying a stay pending an appeal in a case alleged to be similar to the instant one. *Eastern Greyhound Lines v. Fusco* (N. D. Ohio), 51 LRRM 2278, September 12, 1962, stay pending appeal denied (6 Cir. 1962), 51 LRRM 2661. The *Fusco* case was one in which a determination was made by the Board that certain employees were not supervisors, as against the employer's contention that they were supervisors. As opposed to the employer's argument that the decision showed on its face that the employees were supervisors as a matter of law, the Court held: " . . . the hearing examiner's decision shows that he followed the statutory language almost verbatim."

Section 2 (11) of the Act defines the term "supervisor" as meaning "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, . . ." etc. Had the Board found that the employees in issue possessed the authority set forth in the definition and had, nevertheless, found them not to be supervisors, the Board would clearly have been acting in contravention of a statutory provision and outside its jurisdiction. Had that been so,

and only had that been so, the Fusco case would be analogous to the instant case.

3. The petitioner argues that unless the Fifth Circuit's decision be reversed, it would provide added impetus for employers' suits to review Board orders in representation proceedings. The respondent does not argue that the Fifth Circuit's decision expands the doctrine of *Leedom v. Kyne*. On the contrary, the Fifth Circuit's decision is clearly within that doctrine and is a very narrow decision, in that the jurisdiction of federal district courts is limited in such cases to acts which are, on the face of the Board's orders, beyond the Board's statutory authority and in excess of the Board's jurisdiction.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WARREN E. HALL, JR.  
Counsel of Record for Respondent.

CHESTERFIELD H. SMITH,  
WOFFORD H. STIDHAM,  
Of Counsel for Respondent.

**APPENDIX A**

The following are relevant statutes not included in Appendix B of the petition:

**1337. COMMERCE AND ANTI-TRUST REGULATIONS**—The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. (June 25, 1948, c. 646, § 1, 62 Stat. 931, 28 U.S.C. 1337)

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.):

**Sec. 2. \* \* \***

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.



(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

Sec. 8. (a) It shall be an unfair labor practice for an employer \* \* \*

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

Sec. 9 \* \* \* \*

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board —

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in Section 9(a);

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1962 <sup>3</sup>

No. ~~84~~. 77

HAROLD A. BOIRE, REGIONAL DIRECTOR,  
TWELFTH REGION, NATIONAL LABOR RE-  
LATIONS BOARD,

*Petitioner,*

VS.

THE GREYHOUND CORPORATION,

*Respondent.*

**BRIEF OF FLOORS, INC., AS AMICUS CURIAE IN  
OPPOSITION TO PETITION FOR CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT.**

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1962.

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**No. 844.**

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HAROLD A. BOIRE, REGIONAL DIRECTOR,  
TWELFTH REGION, NATIONAL LABOR RE-  
LATIONS BOARD,  
*Petitioner,*

VS.

THE GREYHOUND CORPORATION,  
*Respondent.*

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**BRIEF OF FLOORS, INC., AS AMICUS CURIAE IN  
OPPOSITION TO PETITION FOR CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT.**

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**I. INTRODUCTORY STATEMENT.**

**A. Consent of Parties to Filing of Amicus Curiae Brief.**

Pursuant to Rule 42(1) of the Supreme Court Rules, Floors, Inc. (hereinafter referred to as "Floors"), sought consent of the parties to the above case to the filing by Floors of an *amicus curiae* brief. Such consent of the

parties was received by letter of March 7, 1963, from counsel for Petitioner, and by letter of March 6, 1963, from counsel for Respondent. These letters of consent have heretofore been filed with the Clerk of the Supreme Court.

#### **B. Interest of Floors in the Instant Case.**

The case at bar is the culmination of a proceeding instituted on April 17, 1961, in which Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO (hereinafter referred to as "Amalgamated"), filed a petition with the National Labor Relations Board (hereinafter referred to as the "Board") seeking to represent for purposes of collective bargaining certain employees of Floors who were then working at Greyhound terminals in Miami, Tampa, St. Petersburg and Jacksonville, Florida. On May 25, 1961, Amalgamated's petition was amended to name Southeastern Greyhound Lines (hereinafter referred to as "Greyhound") and Floors as co-employers of the employees involved.

At the hearing of the case before the Board, and at all times since, Floors has consistently contended that it is the sole employer of all of its employees in Florida, including those petitioned for by Amalgamated. Nevertheless, the Board did determine that Greyhound and Floors were co-employers of the employees involved. This ruling acted to completely deprive Floors of the right to conduct its labor relations and control its employee complement in the manner essential to its type of business.

The interest of Floors in the instant proceeding is, therefore, quite clear. It is simply to retain a right which, prior to the decision of the Board, was thought to inhere in every private business—that is, the right to manage its

affairs free from interference and control of another private corporation under the mandate of a governmental agency.

### **C. The Scope of This Amicus Curiae Brief.**

The petition for certiorari filed by the Petitioner relies primarily on the contention that the District Court lacked jurisdiction to enjoin the Regional Director from holding the election as ordered by the Board. We respectfully submit that the Court, under the principles enumerated by this Court in *Leedom v. Kyne*, 358 U.S. 184, was fully justified and authorized to enjoin the election. The reasons for the correctness of the District Court's ruling are set forth fully in Judge Lieb's Opinion (p. 14 of petition for certiorari) and in the brief of Respondent in opposition to the petition. Accordingly, we will not attempt to repeat what was there said concerning the jurisdictional issue.

This brief of Floors will be confined to the question of whether or not the Board exceeded its statutory authority in finding Greyhound and Floors to be co-employers of the employees here involved. It is respectfully submitted that the District Court and the Court of Appeals were eminently correct in deciding this issue. Their decision is in complete accord with prior relevant decisions of other circuits. Accordingly, there is no persuasive reason for this Court to grant the petition for writ of certiorari.

## **II. ARGUMENT.**

### **A. Statement of the Principal Issue.**

The basic issue decided by the District Court and the Fifth Circuit Court of Appeals was whether or not the

Board exceeded its statutory powers in holding that Greyhound was the co-employer with Floors of the employees involved in the Board proceeding. The basis of the decision below is illustrated by the following statement contained in Judge Lieb's Opinion:

"The Court is of the opinion that the findings of the Board, as recited, are, as a matter of law, insufficient to create a joint employer relationship with respect to the employees in said unit; but that, on the contrary, said findings establish as a matter of law that Floors, Inc., is an independent contractor and, for the purposes of collective bargaining, its employees are not the employees of the plaintiff." (Appendix A to petitioner's petition, pp. 15-16).

The lower court in other words confined itself to the particular facts of the case at bar as found by the Board. It was held that the Board exceeded its statutory powers since:

"... Section 9 of the Act expressly contemplates representation proceedings only as regards the employer of the employees comprising the unit found to be appropriate by the Board." (Appendix A to petitioner's petition, p. 16).

The District Court then held, and was affirmed by the Fifth Circuit in so holding, that since the Board had found a company to be an employer even though as a matter of law such company was not an employer it had exceeded its statutory power. The solid foundation upon which the Court's reasoning was based cannot be shaken. The facts supporting that decision will be discussed hereinafter.

Contrary to the position apparently taken by Amalgamated in its *amicus curiae* brief to this Court, the Court below did not hold that the mere fact that Floors is an independent contractor precludes the Board from holding



Floors and Greyhound to be a joint employer. Nor did the Court hold, as Amalgamated and Petitioner appear to contend, that the Board may not hold separate legal entities to be co-employers under the Act. The Court merely looked at the facts of the case at bar, as found by the Board, and held that such facts could not constitute Greyhound an employer of the Floors employees.

The cases cited by Amalgamated in its *amicus curiae* brief on the question stated above are wholly inapplicable to the case at bar. None of them involve factual situations similar to those of the instant case. The case at bar does not involve two corporations having common ownership, management or control over labor policies, as in *N.L.R.B. v. Gibraltar Industries, Inc.*, 51 LRRM 2029 (C.A. 4, 1962), *N.L.R.B. v. Concrete Haulers, Inc.*, 212 F.2d 477 (C.A. 5, 1954), and *N.L.R.B. v. Calcasien Paper Co.*, 203 F.2d 12 (C.A. 5, 1953). Nor is this a case of mere agency for purposes of imputing an unfair labor practice to the employer, as in *N.L.R.B. v. West Texas Utilities Co.*, 218 F.2d 824 (C.A. 5, 1955).

The facts of the case at bar are discussed below. Those facts demonstrate that the Court was wholly correct in deciding that the Board had exceeded its authority in finding Greyhound to be the employer of the Floors employees.

#### **B. The Test of Employer-Employee Relationship.**

In the petition for writ of certiorari and in the *amicus curiae* brief of Amalgamated, it is contended that the Board acted reasonably in finding Greyhound and Floors to be co-employers. Yet nowhere in the petition or the brief is there set forth any principle of law under which the Board could have reached its decision. The apparent contention of Petitioner and Amalgamated is that the Board

is entitled under Section 9 of the Act to make a conclusive determination as to employer-employee relationship, and that such determination cannot be upset by the judiciary regardless of its arbitrariness or the fact that no statutory authority exists for such determination. This contention was rejected by the District Court and the Court of Appeals for the obvious reason that no administrative agency is empowered to completely ignore the statutory source of its authority in making a decision. This is precisely what the Board did in the instant case.

In determining the issue of employer-employee relationship, the Board and the courts have uniformly applied the so-called "right of control" test. This is not, of course, the strict common law control test. It is a test which has been worked out by the Board and approved by the courts as a just formula for furthering the purpose of the Act. The "right of control" test was clearly stated by the Board in the case of *Duane's Miami Corp.*, 119 N.L.R.B. 1331 (1958), as follows:

"... the question as to whether the lessor or the lessee is the employer of the leased department employees in this type of case is determined by which of the two has the primary right of control over matters fundamental to the employment relationship."

This Court recognized the reasonableness of the "right of control" test in the case of *N.L.R.B. v. Denver Building and Construction Trades Counsel*, 341 U.S. 675 (1951). It was there stated by Justice Burton:

"We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of

one the employees of the other. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so. The Board found that the relationship between Doose & Lintner and Gould & Prusner was one of 'doing business' and we find no adequate reason for upsetting that conclusion."

The decision of the Court below in holding as a matter of law that Greyhound is not the employer of the Floors' employees is completely in accord with decisions of other circuit courts on the question of employer-employee relationship. Those courts have uniformly applied the "right of control" test to such situations and have arrived at the same conclusion as was reached by the Court below in the case at bar. There is no conflict in the decisions of the various circuits such as would necessitate the grant of certiorari in the case at bar.

In the case of *N.L.R.B. v. Norma Mining Corp. et al.*, 206 F.2d 38 (C.A. 4, 1953), the Board had found two separate corporate entities to be joint employers of certain employees of one of the companies. Because of factors very similar to those present in the case at bar, the Fourth Circuit Court found that the relationship between the two companies was consistent with a bona fide independent contractor relationship. The Court rejected the Board's findings as to the joint employer status.

In the case of *N.L.R.B. v. Carroll*, 120 F.2d 457 (C.A. 1, 1941), the Respondent engaged in interstate transportation of mail by truck pursuant to a contract with the United States embodying no restrictions on the freedom of the Respondent to employ whomsoever he chose, other than general limitations and provisions that the postmaster might require the suspension of a driver from duty for inefficiency or other serious delinquency. The First Cir-

cuit Court held that Carroll was an independent contractor and the truck drivers hired by him were his employees and not the employees of the United States. At page 458, the Court cites numerous decisions in support of its conclusion.

The Eighth Circuit Court has also arrived at the same conclusion under similar situations. In the case of *N.L.R.B. v. New Madrid Manufacturing Company et al.*, 215 F.2d 908 (C.A. 8, 1954); the Court discussed the requirements necessary to the creation of a co-employer relationship:

"The sole transaction therefore first must be approached in relation to such legal realities as its terms and provisions ostensibly have created. And, unless those terms and provisions, either expressly, or as a matter of reasonable implication, can be said to have given New Madrid a right or power of control over Jones' prerogative of management in general, or over his labor relations in particular, there is no basis on the contract itself to brand Jones and New Madrid as having created the status of co-employership in respect to the Pottsville plant." (Emphasis added)

The above cases have each held, in effect, that the Board cannot arbitrarily find a joint employer status without statutory authorization for such finding. The courts have uniformly sustained a finding of co-employership only where the "right of control" test, correctly applied, has shown it to exist. Where the right of control is not in both parties, the Board's finding of joint employer status has been rejected. This is the situation in the case at bar.

The arbitrary unreasonableness of the Board's decision in the case at bar is best illustrated by comparing that decision with the Board's decision in the case of *Charlotte Union Bus Station et al.*, 135 N.L.R.B. No. 23, 49 LRRM



1461 (1962), which was decided very shortly before the Board's decision in the instant case. That case involved a janitorial service company which was under contract to perform its services for a bus station, a situation identical to the case at bar. In its decision, the Board held that the bus station and the janitorial service company were not joint employers. The control factors upon which its decision was based were identical to those in the instant case. Yet, the result at which the Board arrived was the direct opposite.

The question before the Board in the case at bar was as follows: who had the primary right of control over matters fundamental to the employment relationship? The Labor Management Relations Act, 1947, as amended, as is demonstrated by judicial interpretation and legislative history, limits the Board to this determination. Of the many factors of control which make up the "primary right of control," the ones most frequently given effect by the Board and courts are the following: right to hire, discharge and discipline; right to pay and control wages; right to fix fringe benefits; day-to-day supervision; payment of workmen's compensation insurance, federal and state unemployment insurance and social security; ownership of premises upon which work is performed; ownership of equipment used by employees; and right to control hours of work. The facts of the case at bar add one other control factor which is of highest importance—the right to rotate employees from one customer to another.

### C. The Decision of the Board.

It is crucial to the decision of this Court on the petition for writ of certiorari that it be noted that the decision of the Court of Appeals affirming the District Court was based on the facts as found by the Board. The fact is that

the Board itself found that Floors possessed the factors of control outlined above. The Board stated in its Decision and Order:

"It appears that Floors hires, pays, disciplines, transfers, promotes and discharges the porters, maids and janitors."

The Court below found as a matter of law that the facts as found by the Board could not support its conclusion that Greyhound was the co-employer of the Floors employees. The District Court did not attempt to examine the record of the Board hearing. Such an examination was unnecessary. The fact that the Board had exceeded its statutory power under Section 9 of the Act was clear on the face of the Board's Decision and Direction of Election.

**D. The Facts Supporting the Decision of the Court Below.**

**(1) THE BUSINESS OF FLOORS.**

In the *amicus curiae* brief of Amalgamated, the nature of the business of Floors is completely ignored. The argument of Amalgamated appears calculated to have this Court erroneously believe that Floors is a company formed for the sole purpose of permitting Greyhound to enter into a sham contract by which Greyhound could evade the responsibility for the labor relations of janitorial and service employees. This argument is grossly misleading and fails to do justice to the facts of this case.

Floors, Inc., of Florida is a Florida corporation and a wholly owned subsidiary of Floors, Inc., a Georgia corporation headquartered in Atlanta, Georgia. Floors is engaged in the business of furnishing cleanup, building maintenance and other allied services. It furnishes these services to varied customers throughout Florida, one of

which is Greyhound. Floors employs a total of 384 persons in the State of Florida. Of these 384 employees, only 63 work part or full-time in Greyhound Terminals. Floors contracts to perform services for its customers for a pre-determined price. Floors agrees to provide its customers with a certain number of man-hours of work per week to perform the work contracted for by the customer. All Floors' employees are under the immediate supervision of some one of many Floors' supervisors in Florida.

Greyhound has absolutely no ownership interest in Floors. Nor is there any common control of management of labor policy. This is obviously the case, since only 16% of Floors' employees in Florida were, at the time of the Board hearing, working under Floors' contracts with Greyhound.

## (2) THE CONTROL OF FLOORS OVER ITS EMPLOYEES.

The business of Floors is discussed above. By virtue of the nature of its business, Floors possesses one factor of control over its employees which, we submit, dictates the conclusion that Floors is the sole employer of its employees working at Greyhound terminals. This control factor is the right to "rotate" Floors employees from one customer to another. Simply stated, this is the right, when more man-hours are needed at one customer's place of business, to take an employee who is working on another job and place him on the job which requires more man-hours. It can readily be seen that this is not only a "right" which Floors possesses; it is essential to the carrying out of its business purpose. The crux of Floors' existence is the ability to provide a specialized service to its customers when and as needed. To adequately perform this specialized service, Floors must retain the right to at any given time transfer an employee from one job to another job where he is more needed.

Of course, Floors does not exercise its "right of rotation" indiscriminately, since the longer any employee works on a particular job, the more skilled and efficient he becomes at performing that job. For this reason, employees are rotated only when necessary. But the necessity does arise, and when it does Floors must be able to act to meet the occasion. The record before the Board (pp. 259, 260) contained two instances in which Floors had used employees working at Tampa Greyhound on another job. Since Tampa is a very small part of Floors' operations, it is a reasonable assumption that the rate of rotation in other cities, such as Miami and Jacksonville, would be greater than that in Tampa. In fact, the Board record contains instances of transfer from one job to another in Miami and Jacksonville.

Although the record of the Board hearing was not before the Court below, and is not officially before this Court, the *amicus curiae* brief of Amalgamated contains many citations to that record. Nowhere in Amalgamated's brief, however, is there mention of the right of "rotation" or transfer discussed above, in spite of the obvious fact that this is one of the most important indicia of employer status in the case at bar.

The above discussion of the right of transfer from one customer to another leads into a consideration of another important aspect of the case at bar. The Board found, quite properly, that Floors hires, disciplines, promotes, transfers and discharges the employees at the Greyhound terminal. This points up the fact that customers of Floors, such as Greyhound, do not concern themselves with the particular employees working on the job, but only with the performance of the contract by Floors. That is to say, Floors could have different of its employees working on the Greyhound job every day. Greyhound could not



care less which Floors' employees were on the job, as long as the work which Floors was supposed to perform was performed. Greyhound has no interest whatsoever in the individual Floors' employees.

The record of the Board hearing was clear and the Board found in accordance therewith, that Floors hires and discharges its employees. Yet the Board placed undue emphasis on one occasion on which Greyhound requested that a Floors' employee be removed from the Greyhound job. Floors complied with the request. But even on that one isolated occasion, Greyhound did not effect a discharge of the employee. Only Floors has the ultimate decision to make as to whether to discharge the employee or to transfer him to another Floors' job. Greyhound would have nothing to do with this decision.

Only the essential control factors were mentioned by the Board in its Decision and Order. Many others are present in the case at bar. Floors submits that the Board's decision shows on its face that the Board acted in excess of its authority in finding an employer-employee relationship between Greyhound and the Floors' employees. However, since Amalgamated has chosen in its brief to refer to various portions of the record of the Board hearing, Floors will also refer to that record in order to point out the control factors which completely negate the conclusion reached by the Board.<sup>1</sup>

In line with Floors' right and duty to hire, discipline and discharge its own employees is the fact that Floors also trains the employees for the particular job to which they are assigned. At the Board hearing, the Floors' supervisor in Tampa testified (RB. 173) as to the procedure for

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1. References to the transcript of testimony before the Board are designated as "(RB. \_\_\_\_)".

training new Floors' employees. If the new man is put on a day shift, the supervisor himself gives the training instructions. If the new employee is put on a night shift, the supervisor instructs an older porter to train the new man. Greyhound has absolutely nothing to do with the training of new employees (RB. 173).

As the Board correctly found, the wages of these employees are paid by Floors. There is abundant testimony in the Board record that the pay checks are mailed from Floors' main office in Atlanta to Floors' supervisor in each city (RB. 159, 247). In Tampa, the checks are handed by the supervisor to the employees (RB. 159, 212). He mails the St. Petersburg employees' pay checks to St. Petersburg for the employees' convenience (RB. 159). In Miami the checks are either distributed to Floors' employees by the Floors' supervisor there, or left by him for employees to pick up (RB. 228-229). Floors also handles the withholding of income taxes of its employees (RB. 186).

With respect to who actually controls the amount of the wages paid these employees, the contract between Floors and Greyhound, as stated above, is determined on a man-hour basis. Therefore, Greyhound quite naturally has some concern over the wages paid the Floors' employees. Such concern is essential in order to have some control over the cost factor in the cost-plus contract, which is merely sound business practice. Accordingly, there is testimony in the record to the effect that Floors could not increase the labor cost of the contract by 25% percent without the approval of Greyhound (RB. 253). In spite of this basic economic fact, Floors still makes the initial determination as to the pay which an employee shall receive. Strong evidence of this is found in the fact that all janitors and maids employed by Floors in the Tampa area, working on the premises of various Floors' cus-

tomers, receive the same wage rate (RB. 172, 204). This would certainly not be true if the wage rate were determined by each customer. Further evidence of Floors' control over wages is found in the matter of overtime pay. The agreement between Floors and Greyhound provides that Greyhound will not be charged for overtime wages unless approved by Greyhound (RB. 54). However, Floors can work employees any time it desires with or without approval of Greyhound. The lack of Greyhound approval would only mean that Floors would have to absorb the cost of the overtime payments (RB. 54). This control over overtime wages is not an abstract right possessed by Floors; it has actually been exercised, and Floors has in fact absorbed the overtime costs (RB. 175). From this fact, it can be seen that Greyhound controls only the amount it pays to Floors; it does not control the amount Floors pays to Floors' employees.

Floors also sets the fringe benefits of its employees. The employees of Floors throughout the Tampa area receive the same benefits and working conditions (RB. 206). It is evident from the Board record that as long as Floors provides Greyhound with the number of man-hours contracted for, Greyhound is totally unconcerned with the matter of vacations, holidays, etc. Moreover, Floors pays workmen's compensation insurance, social security, and unemployment compensation on its employees (RB. 186). The payments of these benefits are certainly acts of an employer in relation to its own employees.

The question of supervision is naturally of great importance in determining who is the employer of certain employees. In this connection, it was stipulated at the Board hearing (RB. 281) that the testimony of the Greyhound terminal managers at Jacksonville and St. Petersburg would be substantially the same on the question of

control as the testimony in the record of the terminal managers at Tampa and Miami. The only Floors' supervisor who could be present at the Board hearing was the supervisor of Floors' employees in Tampa and St. Petersburg. Since the contract between Floors and Greyhound is similar in all four cities, in respect to supervision provisions, it can be presumed that the supervision situation in each city is substantially the same.

In an attempt to show a lack of control by Floors' supervisors at the Board hearing, Amalgamated called as a witness one William Warren, Floors' employee at the Tampa Greyhound terminal. On direct examination, Warren could name only two instances since Greyhound and Floors entered their contract that the Greyhound Terminal Manager has requested that he perform a certain job (RB. 210, 211). On cross-examination, Warren stated that he not only looked to the Floors' supervisor for instructions but considered that person to be his boss (RB. 213). On further cross-examination, Warren testified that he would ask the Floors' supervisor, and not the Greyhound Terminal Manager, for permission to get off work, and that in fact he went to the Floors' supervisor to request permission to attend the Board hearing (RB. 213, 214). Warren also testified that after Floors and Greyhound made their contract, he applied to the Floors' supervisor for a job (RB. 214, 215). Warren testified on re-direct examination that Mr. Rhoden, Greyhound Manager, had once asked a Floors' employee to work overtime on a job left vacant by the absence of another Floors' employee (RB. 216), but on re-cross-examination, Warren further stated that Mr. Rhoden had called the Floors' supervisor at St. Petersburg before taking that action (RB. 216, 217). The evidence presented by William Warren supports the position of Floors that it is the employer of these employees.



Floors; by its contracts with Greyhound (pp. 17-37 of the Record before this Court) agreed to furnish supervision over its employees working at the Greyhound terminals. This contractual provision has been complied with by Floors. Amalgamated and Petitioner contend that the actual supervising of these employees is performed by Greyhound. The overwhelming weight of the evidence in the Board record, and particularly the testimony of the Tampa Floors' Supervisor, positively refutes that contention. Floors agreed by a contract to do a job for Greyhound. The two parties initially determined what type of work had to be done, and this necessarily included instructions to Floors as to what was expected of Floors' employees. But this is as far as Greyhound's instructions went. Greyhound representatives do not supervise or instruct Floors' employees on the job, except in the rare case where an emergency necessitates such instruction (RB. 89). The testimony of all Greyhound officials who testified before the Board (RB. 34, 35; 104, 105; 278) is to the effect that their contact with Floors' employees is carried on through the Floors' supervisor, and that it is the supervisor who gives orders to the porters, janitors and maids. The above testimony was directly supported by the introduction into evidence of a memorandum from the Greyhound Superintendent in Tampa to Greyhound supervisors in the Tampa area (RB. 48-50) stating that Greyhound supervisors were to give no instructions to Floors' employees, but were to go to the Floors' supervisor concerning any complaints about Floors' employees' work. This memorandum was dated September 29, 1958, which illustrates the fact that the situation as to supervisory control existing at the time of the hearing had been in existence for at least three years.

The Tampa Floors' supervisor testified to the following facts relating to the question of day-to-day supervision.

The only instructions which the Tampa supervisor receives are from his Floors' superiors, namely, the home office in Atlanta or from C. L. Stewart, who is in charge of the Floors' operation in Florida (RB. 153). The Tampa Greyhound terminal manager does ask the Floors' supervisor to do certain things (RB. 148). If the Floors' man decides that the request is proper and within the contract between Floors and Greyhound, he then instructs the Floors' employees to perform the requested work (RB. 150). In other words, the Floors' supervisor, in carrying out the request of the Greyhound terminal manager, is simply performing Floors' part of the Greyhound contract. If the requested work is not covered by the contract, he can refuse to do it. Any unresolved question would be determined by Floors and Greyhound management. The regular Floors' supervisor testified that when he goes on vacation, another Floors' supervisor replaces him during that period (RB. 189). It is clear that Floors carries out the provision in its contract with Greyhound by which Floors agrees to supervise Floors' employees on the Greyhound premises. For this reason, the Floors' supervisor instructs his employees to comply with requests made by Greyhound personnel in his absence, and to then complain to him (RB. 184). This does not mean that Greyhound personnel can supervise Floors' employees. It simply means that, to avoid friction, the Floors' supervisor would rather take the employees' grievances to Greyhound for complaint himself (RB. 184, 185). It is important to note that it is only because their Floors' supervisor ordered them to do so that the Floors' employees occasionally take instructions from Greyhound.

Day-to-day supervision is an important part of the employer-employee relationship. The record in this case fails completely to show any such control or supervision

exercised by Greyhound over the Floors' employees. The only conclusion which can be reached from the record is that the Greyhound control asserted by Amalgamated does not exist. At most, the Board record shows that Greyhound employees can give Floors' employees occasional routine instructions as to certain details of their work. The direct day-to-day supervision over matters which are important to the employment relationship is performed by the Floors' supervisor.

Another control factor which is pertinent to this case is where and with what materials these employees work. Of course, they work on the premises of Greyhound, since the nature of Floors' business requires its employees to work at the place of business of Floors' customer. However, although these employees are working on Greyhound property, the supplies and equipment (brooms, mops, wax, etc.) which they use on the job are owned by Floors and furnished the employees by Floors (RB. 186, 247).

The question of who controls the employees' hours of work is relevant to this case. It is important to remember here that Floors has contracted to do a job for Greyhound. At the Greyhound terminals in Miami, Tampa, Jacksonville and St. Petersburg, Floors performs the portering and janitorial work. It is clear in the Board record that as long as this work is done properly, Greyhound does not concern itself with which Floors' employees work, when, or how many hours. In the words of the Greyhound terminal manager, "... just as long as everything is handled properly we don't care." (RB. 53). Greyhound's only concern is that the bus schedules be covered (RB. 53). Greyhound posts the bus schedules in the terminal, and it is left to the Floors' supervisor to see that the schedule is covered by Floors' porters (RB. 161). The work hours of

Floors' employees are not set up to coincide in any way with the hours of Greyhound employees (RB. 167, 168). Neither does the Floors' employees' lunch break have any relation to that of the Greyhound employees (RB. 171). The Board record shows clearly that Greyhound has nothing to do with the hours worked by any particular Floors' employee.

In its Decision and Order, the Board found that "... Floors hires, pays, disciplines, transfers, promotes and discharges the porters, janitors and maids." In addition to the above control factors pointed out by the Board, the record of the Board hearing clearly shows that Floors trains all new employees; determines wage rates and pays its employees; handles withholding taxes on its employees; controls fringe benefits and pays workmen's compensation, unemployment insurance and social security on its employees; provides supervision over the day-to-day activities of its employees; owns and furnishes all supplies and equipment used by its employees; and, finally and of crucial importance, Floors retains and exercises the right to use its employees on whatever job it desires at any time.

There is clearly no authority in the statute for the Board to decide that employees of Floors are also employees of Greyhound. Greyhound is simply not an employer, in any sense, of the Floors' employees. The Court below correctly enjoined the Board from acting in excess of its statutory authority.

#### **E. The Effect of the Board's Decision.**

A consideration of the effect which the decision of the Board, if allowed to stand, would have on the business of Floors is relevant to this Court's decision on the petition for writ of certiorari. It also serves to demonstrate the



unreasonableness of the Board's decision and the lack of statutory approval for such decision.

The agreements between Floors and Greyhound covering the various Florida Greyhound terminals are in the record before this Court. There can be no doubt that the agreements create a legitimate independent contractor relationship. The sole purpose of Floors' corporate existence is to provide janitorial and other services of a like nature to its customers. Greyhound is only one of many customers serviced by Floors.

The growth of companies similar to Floors has been phenomenal in the past decade. They serve a highly beneficial purpose to the American economy, as is illustrated by the Floors-Greyhound situation. Greyhound is primarily in the business of bus transportation. The selling of bus tickets, the maintenance of its buses, and the driving of their buses to destination are the primary concerns of Greyhound. The janitorial and portering services at Greyhound terminals, while necessary, is not directly a part of Greyhound's business objective. For that reason, Greyhound contracts out its janitorial and portering work to an independent contractor who can provide specialized and efficient service in that area. This relieves Greyhound of the expense and burden of managing and controlling the janitorial and portering services at its terminals.

At the same time, the expense and burden of such services is completely assumed by the independent contractor. The expense is less because of the degree of specialization with which the contractor performs the services. The burden is less because the contractor can concentrate on those particular services. It does not have to worry about the operation of a large bus transportation

company. The legitimate benefit afforded by companies such as Floors is obvious.

What is the effect of the Board's decision in the case at bar on the situation described above? Greyhound is held to be a joint employer of Floors' employees. It is no longer relieved of the burden of managing the janitorial services at its terminals. In fact, the burden is multiplied. Now, it cannot even act with respect to those services as it wishes, since it must act jointly with another, wholly independent company. By the same token, Floors, which has hired, fired, disciplined, paid, transferred and controlled its employees at the Greyhound terminal, now finds that it is no longer their employer. Floors no longer has control over their employment relationship, since it must consult Greyhound whenever it desires to act on a matter of labor relations.

The arbitrary creation by the Board of a joint employer status will inevitably cause companies such as Floors to be eliminated. Their beneficial purpose will simply have been destroyed. Moreover, the Board's decision does not purport to favor the interests of the particular employees involved in this case. No persuasive reason has been, or could be, given for the baseless finding that Greyhound and Floors are co-employers of the Floors' employees.

### III. CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

WILSON, BRANCH, BARWICK & VANDIVER,

By \_\_\_\_\_

ALEXANDER E. WILSON, JR.,

Counsel for Floors, Inc., Amicus Curiae.

### CERTIFICATE OF SERVICE.

This is to certify that I have this day served copies of the foregoing *amicus curiae* brief of FLOORS, INC., upon the following, by depositing same in the United States Mail, properly addressed and with the correct amount of postage affixed thereto:

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Hon. Stuart Rothman, General Counsel  
National Labor Relations Board  
Washington 25, D. C.

This 23rd day of March, 1963.

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ALEXANDER E. WILSON, JR.,  
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# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 77

HAROLD A. BOIRE, REGIONAL DIRECTOR, TWELFTH  
REGION, NATIONAL LABOR RELATIONS BOARD,  
PETITIONER

v.

THE GREYHOUND CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE REGIONAL DIRECTOR OF THE NATIONAL  
LABOR RELATIONS BOARD

## OPINIONS BELOW

The *per curiam* opinion of the court of appeals (R. 71) is reported at 309 F.2d 397. The decision of the district court (R. 52-59) is reported at 205 F. Supp. 686. The Board's Decision and Direction of Election (R. 67-69) is not officially reported.

## JURISDICTION

The judgment of the court of appeals was entered on November 21, 1962 (R. 72). The petition for a writ of certiorari was filed on February 18, 1963, and

was granted on April 15, 1963 (R. 73; 372 U.S. 964). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 33-38.

#### QUESTION PRESENTED

Whether a district court has jurisdiction, at the suit of an employer, to enjoin a representation election directed by the National Labor Relations Board.

#### STATEMENT

In April 1961, the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO ("the Union") filed a petition with the National Labor Relations Board, pursuant to Section 9(c) of the National Labor Relations Act, requesting a representation election among the porters, janitors and maids working at four bus terminals in Florida operated by the Greyhound Corporation (R. 65).<sup>1</sup> The employees whom the Union sought to represent were on the payroll of Floors, Inc., of Florida, a corporation engaged in the business of providing cleaning, maintenance and similar services in

<sup>1</sup> The original petition applied only to the porters and maids (R. 65). The petition was amended at the Board hearing to include janitors (R. 67).

Florida to various customers like Greyhound (R. 68, 42-43). Floors was under contract with Greyhound to provide services at Greyhound's terminals in Miami, St. Petersburg, Tampa and Jacksonville (R. 16-34).<sup>\*</sup> The Union's amended petition designated both Greyhound and Floors as the "Employer" of the service employees and requested a single bargaining unit comprised of the employees at the four terminals (R. 66).

At the Board hearing on the Union's petition, the Union contended that Greyhound was a joint employer of the employees and that the unit requested was therefore appropriate as a residual unit of all unrepresented Greyhound employees at the four terminals. Alternatively, the Union contended that the requested unit was appropriate because the employees concerned comprised a homogeneous, distinct group. Greyhound and Floors contended that Floors was the sole employer of the employees and Floors contended that the bargaining unit should not be restricted to its employees working at Greyhound terminals but should consist either of all Floors' employees in Miami, St. Petersburg, Tampa and Jacksonville or of three separate units of all Floors' employees in (1) Tampa-St. Petersburg, (2) Miami, and (3) Jacksonville (R. 68).

<sup>\*</sup>The record shows that in the Jacksonville terminal the porters, janitors and maids were employed directly by Greyhound prior to 1954. The Union represented these employees under a collective bargaining agreement entered into with Greyhound in 1953. When Greyhound contracted with Floors on November 11, 1954, the Union lost its representation of the service employees at the Jacksonville terminal (R. 37-40). The record does not show the history at the other three terminals.



On May 3, 1962, the Board issued a Decision and Direction of Election finding Greyhound and Floors to be joint employers of the porters, janitors and maids and holding that a unit consisting of the jointly employed workers was an appropriate unit in which to hold an election (R. 68).<sup>3</sup> The Board directed an election among the employees in this unit to determine whether or not they desired to be represented by the Union (R. 69). Floors' motion for reconsideration was denied (R. 70). The election was tentatively scheduled for May 28 or 29, 1962 (R. 15). As a consequence of the present action, the election has not been held.

On May 23, 1962, Greyhound filed suit against the Regional Director of the Board in the United States District Court for the Southern District of Florida, seeking an injunction restraining the Regional Director from conducting an election pursuant to the Board's Decision and Direction of Election of May 3, 1962, and further seeking an order striking down and setting aside the Decision and Direction of Election. Greyhound contended in its

<sup>3</sup>The Board found that there was "common control" over the employees involved. The Board found that, while Floors hires, pays, disciplines, transfers, promotes and discharges the employees, Greyhound participates in setting up work schedules and in determining the number of employees needed to meet the schedules. Moreover, the Board found that Floors' supervisors visit the terminals only irregularly, that the employees receive work instructions from Greyhound officials, and that Greyhound on one occasion caused the discharge of an employee it considered unsatisfactory. Member Rodgers dissented, believing that the employees were employees of Floors and that the only appropriate bargaining unit was one consisting of all Floors' employees in the four cities. (R. 68.)

complaint that it was not an employer of the employees concerned, that it had therefore illegally been made a party to the representation proceeding, and that it had a right to an order enjoining the election (R. 1-8).

On May 24, 1962, the district court issued a temporary restraining order (R. 48-50), which it later extended until June 14, 1962 (R. 51). On June 12, 1962, after a hearing, the district court permanently enjoined the Regional Director from conducting an election pursuant to the Board's Decision (R. 52-59). The district court held that it had jurisdiction upon the authority of *Leedom v. Kyne*, 358 U.S. 184.

On the merits, the district court held that the Board's findings showed as a matter of law that Greyhound was not a joint employer of the employees, and that "the Board is prohibited by the provisions of the National Labor Relations Act, as amended, from conducting a representation election wherein the plaintiff is a party-employer with regard to persons who, under the Act, are not its employees" (R. 53).

The Court of Appeals for the Fifth Circuit affirmed on the opinion of the district court (R. 71) and this Court granted certiorari (R. 73).<sup>2</sup>

#### SUMMARY OF ARGUMENT

In enacting the Wagner Act, Congress did not make any provision for direct judicial review of Board de-

<sup>2</sup>A case similar to this one has recently been decided by the District Court for the Eastern District of Michigan. *City Cab Co. v. Roumell*, 53 LRRM 2580, decided June 20, 1963. After careful consideration, the court held that it did not have jurisdiction.

eisions in certification proceedings. Instead, Congress provided in Section 9(d) for judicial review only when the result of a certification proceeding forms the basis of a final unfair labor practice order. Congress' clearly manifested purpose was to prevent employers from delaying representation elections by obtaining immediate judicial review of Board decisions directing elections. Greyhound in this case seeks exactly what Congress precludes, and the district court therefore had no jurisdiction.

*Leedom v. Kyne*, 358 U.S. 184, which created a "limited exception" to Congress' withdrawal of jurisdiction to review certification proceedings, does not support the district court's assertion of jurisdiction. *Kyne* was a suit by a union, which had been certified as bargaining agent, to protect the explicit statutory right of a class of employees to a particular type of bargaining unit. This Court held that Congress did not mean to withdraw jurisdiction in those circumstances. *Kyne* was different from the present case for at least three separate reasons: (1) *Kyne* was a suit brought after election and certification; (2) *Kyne* was a suit brought by a union rather than an employer; (3) the Board in *Kyne* had clearly violated a specific remedial statutory provision.

#### ARGUMENT

##### *Introduction*

Before setting out the reasons for contending that the district court did not have jurisdiction, it may be helpful to describe the statutory context in which the case arises.

Section 9(a) of the National Labor Relations Act (29 U.S.C. Sec. 159(a)) provides that a representative designated or selected by the majority of employees in an appropriate bargaining unit shall be the exclusive bargaining representative of all the employees in the unit. Under Section 8(a)(5) of the Act, it is an unfair labor practice for an employer to refuse to bargain with this representative. Although an employer has an obligation to recognize and to bargain with his employees' representative in the absence of any determination by the National Labor Relations Board designating the representative,<sup>4</sup> Section 9(c) of the Act provides a procedure whereby the Board may "certify" a representative in doubtful cases. The Union sought to use that procedure in this case in order to achieve certification as the representative of employees working at the four Greyhound Florida bus terminals.

Under Section 9(c), a union which alleges that a substantial number of employees wish it to be their representative and that the employer declines to recognize it, may, by filing a petition, commence a certification proceeding before the Board. If, after investigation and hearing, the Board finds that a question of representation exists, "it shall direct an election by secret ballot and shall certify the results thereof." The unit in which the election is to take place is the unit the Board determines to be appropriate "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this

<sup>4</sup> *E.g., National Labor Relations Board v. Remington Rand, Inc.*, 94 F. 2d 862 (C.A. 2).



Act." The Board, in this case, after petition, investigation and hearing, directed an election in a unit consisting of all porters, janitors and maids working at Greyhound's four Florida bus terminals. The district court has reviewed and enjoined that direction of election and the question here is whether the district court had jurisdiction to do so.

There is no provision of the Act conferring district court jurisdiction. On the contrary, the review provisions of the Act (Sections 10 (e) and (f)) provide for review of only "final order[s]" of the Board, and such review is to take place in a court of appeals. In *American Federation of Labor v. National Labor Relations Board*, 308 U.S. 401, this Court held that "final order[s]" include only orders entered by the Board in unfair labor practice proceedings (for example, in proceedings against an employer for refusing to bargain under Section 8(a)(5)), and do not include Board decisions in certification proceedings under Section 9(c). Thus it was made clear that a Board decision directing an election would not be directly reviewable in a court of appeals. The Court in the *American Federation of Labor* case, however, expressly left open the question whether, despite the absence of a provision for review of certification decisions, some Board decisions in certification proceedings might nevertheless be directly reviewed by independent suits in the district courts. 308 U.S. at 412. The question was again left open in *Inland Empire Council v. Millis*, 325 U.S. 697, 700.

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\* Under Section 9(b), "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

Thereafter, in *Leedom v. Kyne*, 358 U.S. 184, the Court held that such jurisdiction did, in fact, exist in some circumstances. Respondent's argument is that this case comes within the rationale of the *Kyne* decision.

One other provision of the Act is extremely important in the present case. Although the Act provides that certification decisions are not *directly* reviewable in the courts of appeals as "final order[s]," Section 9(d) expressly provides an indirect route toward full judicial review in a case like this one. Section 9(d) states that, when a "final order" in an unfair labor practice proceeding is based upon a certification proceeding, "such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed" with the court of appeals reviewing the unfair labor practice order under Section 10. In reviewing a final order in an unfair labor practice proceeding, the court of appeals therefore will review the validity of any certification which underlies the unfair labor practice charge.\*

Suppose, for example, that a union certification is deemed by an employer to be contrary to a provision of the Act. (The employer contends, for example, that the election was held in an inappropriate bargaining unit.) The employer thereupon refuses to bargain with the union. Should the Board hold that, because of the union's certification, the employer is

\* E.g., *May Department Stores Co. v. NLRB*, 326 U.S. 376; *National Labor Relations Board v. Pittsburgh Plate Glass Co.*, 270 F. 2d 167 (C.A. 4), certiorari denied, 361 U.S. 943.

committing an unfair labor practice by refusing to bargain with it, any error in the certification becomes a defense to a proceeding by the Board to enforce its order in a court of appeals. And should an employer contend that it is not the employer of certain employees, as Greyhound argues in this case, it also may plainly obtain judicial review of that issue in a court of appeals should the Board seek to compel the employer to bargain with a union certified to represent those employees.' Section 9(d) thus provides a means by which employers may obtain full judicial review of Board certification decisions without invoking the jurisdiction of a district court.

# I

## CONGRESS DELIBERATELY PRECLUDED SUITS BY EMPLOYERS TO ENJOIN REPRESENTATION ELECTIONS

The history of the National Labor Relations Act shows clearly that Congress' omission of a provision for direct judicial review of certification decisions was deliberately intended to preclude employers from using judicial review to prevent Board elections. Congress' determination to prevent direct review was based upon its unsatisfactory experience with prior legislation, which had afforded such review of orders directing elections. The predecessor of the National Labor Relations Act was Public Resolution 44 of June 19, 1934,<sup>1</sup> which created the first National Labor Relations Board to administer Section 7(a)

<sup>1</sup> E.g., *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111.

<sup>2</sup> 48 Stat. 1183.

of the National Industrial Recovery Act.\* In Public Resolution 44 Congress had provided for immediate judicial review of Board orders in certification proceedings." Experience with that Resolution showed that employers would quickly take advantage of such a broad provision for judicial review to contest orders directing elections and thereby delay the commencement of collective bargaining. Congress found that such review under Public Resolution 44 seriously impaired the legislative purpose. The Senate Report on the Wagner Act described the shortcomings of direct review as follows:

*Obstacles to elections.*—Under Public Resolution 44, any attempt by the Government to conduct an election of representatives may be contested *ab initio* in the courts, although such election is in reality merely a preliminary determination of fact. This means that the Government can be delayed indefinitely before it takes the first step toward industrial peace. After almost a year not a single case, in which a company has chosen to contest an election order of the

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\* 48 Stat. 198.

"The Resolution gave the Board power "to order and conduct an election by a secret ballot of any of the employees of an employer, to determine by what person or persons or organizations they desire to be represented \* \* \* and to select their representatives for the purpose of collective bargaining \* \* \* The review provision of the Resolution provided that "[a]ny order issued by such board under the authority of this section may, upon application of such board or upon petition of the persons or persons to whom such order is directed, be enforced or reviewed, as the case may be, in the same manner, so far as applicable, as is provided in the case of an order of the Federal Trade Commission under the Federal Trade Commission Act." 48 Stat. 1183, c. 677, § 2.



Board, has reached decision in any circuit court of appeals."

Therefore, when Congress in the Wagner Act deliberately omitted any provision for immediate judi-

"S. Rep. No. 573, on S. 1958, 74th Cong., 1st Sess., pp. 5-6, in 2 Legislative History of the National Labor Relations Act, 1935 (G.P.O., 1949), p. 2305. The House Report is to the same effect. H. Rep. No. 972 on S. 1958, 74th Cong., 1st Sess., pp. 5-6, in 2 Legislative History of the National Labor Relations Act, 1935, pp. 2960-2961. See also the testimony of Senator Wagner and Francis Biddle (then Chairman of the National Labor Relations Board) in the Hearings before the Senate Committee on Education and Labor on S. 1958, in 1 Legislative History of the National Labor Relations Act (G.P.O., 1949), 1935, pp. 1425-1426; 1473-1474.

Senator Wagner:

"A second stumbling block in the pathway of the Board has to do with the holding of elections. Under Public Resolution 44, passed last June, any attempt of the Board to hold an election may be contested at the outset in the Federal courts. As a result, the Board, during the last half year, has been able to conduct elections in only 2 cases out of 8. In every case where the company has refused consent to an election, the Board has been tied up so indefinitely that not a single controversy has yet been argued in any circuit court of appeals. \* \* \*

Chairman Biddle:

"A special feature of the enforcement problem which again sharply illustrates the collapse of existing machinery is the matter of elections \* \* \*

"Although Joint Resolution 44, to which I have referred, attempted to secure to the Board an effective power to order and conduct elections by permitting a subpoena of pay rolls, the resolution in this respect has been wholly nullified. Many elections (191 from October to March) have been held by the regional boards by consent; but in every case where the employer has not consented to the holding of the election and the national Board has been compelled to use its power to order an election the employer has succeeded in tying up the

cial review of Board decisions in certification proceedings, Congress "intended to make it clear that when the Board orders an election, persons affected by that order cannot come into court until after the election has been held \* \* \*." To afford an alternative route of judicial review which would, in the words of the House Report, furnish "an exclusive, complete, and adequate remedy" without delaying bargaining, Congress provided in Section 9(d) of the Act that the correctness of a Board certification de-

enforcement of the order almost indefinitely in the courts. In six cases the Board has ordered an election over the objection of the employer and in all six cases the employer has filed a petition with the circuit court of appeals to review the Board's order in accordance with the provision of resolution 44 \* \* \*. Of the 6 cases the Board's decision in 2 was issued in November 1934, in 1, in December 1934, and in 3, in January 1935. In no one of these cases has the matter even come before the court for argument."

See also the debate in the Senate, 79 Cong. Rec. 7658.

"Memorandum comparing S. 1958, 74th Cong., 1st Sess., with S. 2926, 73d Cong., in 1 Legislative History of the NLRA, 1935, p. 1323.

"H. Rep. No. 972 on S. 1958, 74th Cong., 1st Sess., p. 20, in 2 Legislative History of the NLRA, 1935, p. 2977: The whole relevant passage in the Report reads as follows:

"\* \* \* Section 9(d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9(c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to section 10(e) or (f), the Board's actions and determi-

cision might be challenged when that decision later forms the basis of an unfair labor practice charge. Section 9(d) was written to provide "for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election."<sup>14</sup> Where Section 9(d) afforded ultimate review of certification decisions, the clearly manifested legislative purpose was thus to prevent employers from delaying elections through immediate judicial review of decisions directing elections.

nations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under sections 10(b) and 10(c)."

See also S. Rep. No. 573, 74th Cong., 1st Sess., p. 14, in 2 Legislative History of the NLRA, 1935, p. 2314:

"Section 9(d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. There is no more reason for court review prior to an election than for court review prior to a hearing. But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by any aggrieved party in the Federal courts in the manner provided in section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board."

See also, explaining the intended effect of Section 9(d), Memorandum, *supra*, p. 13, n. 12, 1 Legislative History of the NLRA, 1935, p. 1357.

<sup>14</sup> 79 Cong. Rec. 7658.

In 1947, when the Taft-Hartley Amendments to the National Labor Relations Act were under consideration, Congress was asked to modify its general withdrawal of jurisdiction and to permit any interested person to obtain review immediately after a certification of collective bargaining representatives. (The proposed amendment would not have permitted pre-election review, as in this case.) In considering the amendment, Congress knew that under the existing Act an employer could obtain review only when "the employer committed an unfair labor practice, no matter how much in good faith he doubted the validity of the certification."<sup>18</sup> Although the amendment was passed by the House, it was eliminated in conference<sup>19</sup> because, as Senator Taft explained, "such provision would permit dilatory tactics in representation proceedings."<sup>20</sup>

There is therefore no doubt that Congress' failure to provide for direct review of certification decisions was not accidental but reflected a deliberate legislative policy to exclude employers from obtaining immediate judicial review of Board decisions directing elections. Greyhound in this case seeks exactly what

<sup>18</sup>H. Rep. No. 245, 80th Cong., 1st Sess., p. 43, in 1 Legislative History of the Labor Management Relations Act, 1947 (G.P.O., 1948), p. 334.

<sup>19</sup>H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 56-57, in 1 Leg. Hist. of the LMRA, 1947, pp. 560-561.

<sup>20</sup>93 Cong. Rec. 6444; 2 Leg. Hist. of the LMRA, 1947, p. 1542. See also H. Rep. No. 245, 80th Cong., 1st Sess. (Minority Report), in 1 Leg. Hist. of the LMRA, 1947, p. 385.



Congress meant to prevent, and the district court therefore did not have jurisdiction.<sup>17a</sup>

## II

### LEEDOM v. KYNE DOES NOT SUPPORT JURISDICTION IN THIS CASE

Greyhound contends that this Court's decision in *Leedom v. Kyne*, 358 U.S. 184, must nevertheless be interpreted to permit the instant suit.

In *Leedom v. Kyne*, the Board, after an election, certified the successful union as representative in a bargaining unit consisting of 233 professional and 9 non-professional employees. Prior to the representation election the Board had taken no vote of the professional employees to determine whether a majority of them wished to be included in a unit with non-professional employees. This was directly in violation of Section 9(b) of the Act providing that "the Board shall not (1) decide that any unit is appropriate \* \* \* if such unit includes both professional employees and employees who are not professional unless a majority of such professional employees vote for inclusion in such unit." The union thereupon brought suit in a district court to set aside the certification. This Court held that the Board's action was plainly "in excess of [the Board's] delegated powers and contrary to a specific prohibition in the Act." 358 U.S. at 188, 189. In these circumstances, the Court held that the district court had jurisdiction of a suit

<sup>17a</sup> The enactment of the Administrative Procedure Act, 5 U.S.C. 1001, *et seq.*, did not confer jurisdiction where Congress had previously excluded it. *Operating Engineers, Local No. 148 v. Operating Engineers, Local No. 2*, 173 F. 2d 557, 559 (C.A. 8); *Kirkland v. Atlantic Coast Line R. Co.*, 167 F. 2d 529 (C.A. D.C.)

brought by the union to set aside the certification because " 'absence of jurisdiction of the federal courts' would mean 'a sacrifice or obliteration of a right which Congress' has given professional employees \* \* \*. This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." 358 U.S. at 190.

The Court has just emphasized that *Leedom v. Kyne* fashioned only a "limited exception" to Congress' general preclusion of district court jurisdiction. *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 16. The Court also carefully warned in *Sociedad* that its decision there was "not to be taken as an enlargement of the exception in *Kyne*." *Id.* at 17. The requirements for jurisdiction under *Kyne* have been found to be stringent by the courts of appeals: of the fourteen cases "discussing the applicability of *Kyne* to suits

<sup>18</sup> *National Biscuit Division v. Leedom*, 285 F. 2d 161 (C.A. D.C. 1959); *Leedom v. Norwich, Connecticut Printing Union*, 275 F. 2d 628 (C.A. D.C. 1960); *International Ass'n of Tool Craftsmen v. Leedom*, 276 F. 2d 514 (C.A. D.C. 1960); *Leedom v. International Brotherhood of Electrical Workers*, 278 F. 2d 237 (C.A. D.C. 1960); *Atlas Life Ins. Co. v. Leedom*, 284 F. 2d 231 (C.A. D.C. 1960); *Department & Specialty Store Employees' Union v. Brown*, 284 F. 2d 619 (C.A. 9 1961); *Local 1545, United Brotherhood of Carpenters and Joiners v. Vincent*, 286 F. 2d 127 (C.A. 2 1960); *Navajo Tribe v. National Labor Relations Board*, 288 F. 2d 162 (C.A. D.C. 1961); *McLeod v. Local 476, United Brotherhood of Indus. Workers*, 288 F. 2d 198 (C.A. 2 1961); *Boyles Galvanizing Co. v. Waers*, 291 F. 2d 791 (C.A. 10 1961); *Empresa Hondurena de Vapores, S.A. v. McLeod*, 300 F. 2d 222 (C.A. 2 1962); *Consolidated Edison Co. v. McLeod*, 302 F. 2d 354 (C.A. 2 1962); *Milk and Ice Cream Drivers Union v. McCulloch*, 306 F. 2d 763 (C.A. D.C. 1962); *Miami Newspaper Pressmen's Union v. McCulloch*, No. 17,459.

brought under the Act, in only three unusual cases has the court held that a district court had jurisdiction. One of these cases<sup>19</sup> had exceptional international implications justifying the inference that Congress would have intended an assumption of jurisdiction.<sup>20</sup> A second was a suit by an Indian tribe claiming exemption from the Act, in which jurisdiction was not disputed by the parties and the Board was upheld as being plainly correct on the merits.<sup>21</sup> The third, decided on July 18, 1963, was an unusual suit to enforce certification proceedings, rather than to set them aside, as in this case. A union sued to compel the Board to certify the results of an election which the union had won.<sup>22</sup> The court

(C.A. D.C.), July 18, 1963, 53 LRRM 2786. See also *Eastern Greyhound Lines v. Fusco*, 310 F. 2d 632 (C.A. 6 1962); *Cox v. McCulloch*, 315 F. 2d 48 (C.A. D.C. 1963).

Under the Railway Labor Act, where this Court held in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, that district courts had no jurisdiction to review certification proceedings, the three court of appeals decisions discussing the applicability of *Kyne* have all held that district court jurisdiction did not exist: *UNA Chapter v. National Mediation Board*, 294 F. 2d 905 (C.A. D.C. 1961); *Air Line Stewards and Stewardesses Assoc. v. National Mediation Board*, 294 F. 2d 910 (C.A. D.C. 1961); *WES Chapter v. National Mediation Board*, 314 F. 2d 234 (C.A. D.C. 1962).

<sup>19</sup> *Empresa Hondurena de Vapores v. McLeod, S.A.*, 300 F. 2d 222 (C.A. 2), judgment vacated, 372 U.S. 10 (see *infra*, pp. 27-28). Strictly, the court did not say that *Kyne* applied, but created an additional exception to the withdrawal of jurisdiction because of the extraordinary circumstances of the case.

<sup>20</sup> See *infra*, p. 22.

<sup>21</sup> *Navajo Tribe v. National Labor Relations Board*, 238 F. 2d 163 (C.A. D.C.).

<sup>22</sup> *Miami Newspaper Pressmen's Union v. McCulloch*, No. 17, 459 (C.A. D.C.), July 18, 1963, 53 LRRM 2786.

held that, in the circumstances, the Act imposed a "mandatory duty" on the Board to certify the union and that district court jurisdiction existed to enforce that duty.

*Leedom v. Kyne* therefore did not generally reverse Congress' withdrawal of direct jurisdiction to review certification decisions. Rather, *Kyne* created a narrow exception applicable only to cases sufficiently different from those confronting Congress when it enacted the Wagner Act—and sufficiently urgent—to permit the conclusion that Congress did not intend to exclude direct review. The present case is not in any regard an unusual case calling for the exceptional remedy of immediate review. It is, on the contrary, an example of exactly what Congress had in mind when it acted to withdraw jurisdiction. Specifically, *Kyne* contained three elements supporting the existence of jurisdiction which are missing here: (1) *Kyne* was a suit brought after election and certification of a bargaining agent, when administrative remedies had been exhausted. This is a suit to prevent an election and is premature even if review would otherwise be appropriate. (2) *Kyne* was a suit by a union, which had no adequate remedy under Section 9(d) for the alleged violation. This is a suit by an employer which has an adequate remedy under Section 9(d). (3) The Board in *Kyne* had acted in plain violation of a specific, explicit, remedial provision of the Act. The Board in this case has at worst made an error of fact which should only be reviewed on the Board record in a court of appeals.



For these three reasons, *Kyne* does not justify the conclusion that there is jurisdiction here.

A. THIS IS A SUIT TO PREVENT AN ELECTION

Unlike the plaintiff in *Kyne*, which waited until administrative remedies had been exhausted, the respondent in this case seeks judicial review *before* an election has taken place, in an attempt to prevent the election. The legislative history of the Wagner Act literally could not be plainer in showing Congress' purpose to prohibit such *pre-election* judicial review. Both the Senate and House Reports are absolutely explicit:

Senate:

*Section 9(d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. There is no more reason for court review prior to an election than for court review prior to a hearing. . . .*

House:

As previously stated in this report, the efficacy of Public Resolution 44 has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9(d) of the bill *makes clear that there is to be no court review prior to the holding of the election*, and provides an exclusive, complete, and adequate remedy whenever an

<sup>22</sup> S. Rep. No. 573 on S. 1958, 74th Cong., 1st Sess., p. 14; 2 Leg. Hist. of the NLRA, 1935, p. 2314 (emphasis added).

order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9(c)."<sup>24</sup>

Senator Wagner explained to the Senate Labor Committee that the "present bill cures this difficulty [of employers indefinitely delaying elections through judicial review] *by providing that the Board may conduct elections without anterior court review.*"<sup>25</sup>

Francis Biddle (then Chairman of the National Labor Relations Board) stated to the same Committee that the "bill allows the Board to order the election without provision for review of the election order. \* \* \* *Obviously an employer should not be allowed to hold up an election.*"<sup>26</sup> A Senate Committee memorandum explaining the differences between Public Resolution 44 and the Wagner Act pointed out:

Section 9(d) is a new provision intended to *make it clear that when the Board orders an election, persons affected by that order cannot come into court until after the election has been held* and the Board directs that the employer take some action based upon the results of that election. \* \* \*

Greyhound's premature suit before election also violates the general principle compelling exhaustion of administrative remedies before resort is had to judi-

<sup>24</sup> H. Rep. No. 972 on S. 1958, 74th Cong., 1st Sess., p. 20, 2 Leg. Hist. of the NLRA, 1935, p. 2977 (emphasis added).

<sup>25</sup> Hearings before the Senate Committee on Education and Labor on S. 1958, 1 Leg. Hist. of the NLRA, 1935, pp. 1425-1426 (emphasis added).

<sup>26</sup> *Id.* at 1474 (emphasis added).

<sup>27</sup> 1 Leg. Hist. of the NLRA, 1935, p. 1323 (emphasis added).

cial review, for Greyhound's dispute with the Board will become moot should the Union lose the election which the Board has directed. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-52; *Whitehouse v. Illinois Central R.R. Co.*, 349 U.S. 366, 373-374; *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 767-768.

Strict prohibition of review sought before an election is also well justified by practical considerations. Pre-election review necessarily delays expression of the employees' desire regarding representation. This delay easily leads to unjustified attrition of a union's strength which may, in turn, encourage the union to strike to achieve recognition denied it through the orderly certification procedure. Prompt expression of the employees wishes may forestall a strike and encourage bargaining. Congress in 1935 recognized this danger of industrial warfare as a reason for precluding pre-election review: "

\* \* \* The ability of employers to block elections has been productive of a large measure of industrial strife. When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the employer refuses to accord such recognition, the union, unless an election can promptly be held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the

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"H. Rep. No. 972 on S. 1958, 74th Cong., 1st Sess., pp. 5-6, 2 Leg. Hist. of the NLRA, 1935, pp. 2960-2961.

courts, or else is forced to call a strike to achieve recognition by its own economic power. Such strikes have been called when election orders of the National Labor Relations Board have been held up by court review.

In *McCulloch v. Sociedad Nacional*, 372 U.S. 10, this Court permitted a pre-election injunction of a Board representation election to be obtained by a union. *Sociedad* was an extraordinary case of international character in which, with regard to jurisdiction, the Court said (372 U.S. at 16-17):

\* \* \* the overriding consideration is that the Board's assertion of power to determine the representation of foreign seamen aboard vessels under foreign flags has aroused vigorous protests from foreign governments and created international problems for our Government. \* \* \* [T]he presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power.

---

There is nothing remotely comparable here.

B. THIS IS A SUIT BY AN EMPLOYER WITH AN ADEQUATE JUDICIAL REMEDY UNDER SECTION 9(d) OF THE ACT

The plaintiff in *Leedom v. Kyne* was a union which had no remedy except a suit in the district court for protecting the right which the Board had violated in the certification proceedings. The absence of another remedy was a principal reason for the Court's decision in *Kyne*. The employer in this case, however, has an adequate statutory remedy in the court of appeals



should the Board election result in an unlawful certification. Nothing in *Kyne* should permit an employer to circumvent the statutory procedure for review of certification proceedings by an independent equity suit in a district court. Cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41.

The union in *Kyne* had been unlawfully certified to represent a unit containing some non-professional workers in addition to professional employees. To protect the professional employees' right to an exclusive unit, the union might have refused to bargain on behalf of the non-professionals. If all parties concerned acquiesced in this, the professional employees would have suffered no harm from the Board's error—although the non-professionals would have been unrepresented. Also, theoretically, the union's refusal to bargain for the non-professionals in *Kyne* might have given rise to an unfair labor practice charge against the union under Section 8(b)(3) of the Act, which might have enabled the union to obtain judicial review of the Board's unit determination.

However, it was also quite possible in *Kyne* that the employer would refuse to bargain with the union except in the unit which had been certified by the Board. In that situation, unless there were district court jurisdiction to set aside the certification, the union would be helpless to protect the right which the Board had violated. The union would be forced either to bargain as the employer wished—in an improper unit—or not to bargain at all. Neither the union nor the employees could precipitate an unfair labor practice proceeding against the employer for re-

fusing to bargain with a union representing solely the professionals, when a different unit had been certified by the Board. The General Counsel of the Board could hardly be expected to issue a complaint against an employer for refusing to bargain except in the unit just certified. A decision by the General Counsel not to bring charges would not be judicially reviewable. *E.g., Retail Store Employees Local 954 v. Rothman*, 298 F. 2d 330 (C.A. D.C.). It is, moreover, probably an unfair labor practice for a union to insist that an employer bargain in a unit different from the one the Board has certified. *Douds v. International Longshoremen's Ass'n*, 241 F. 2d 278 (C.A. 2).

The Court in *Kyne* could therefore say that in the absence of district court jurisdiction "there is no other means, within their [the employees] control \* \* \* to protect and enforce that right." 358 U.S. 190.<sup>22</sup> On the other hand, an employer who as-

<sup>22</sup> The inadequacy of the union's remedy was also recognized by the court of appeals in *Kyne* (249 F. 2d 490, 492): "Here review by way of § 10 is too remote and conjectural to be viewed as providing an adequate remedy \* \* \*. Since the employer is not aggrieved by the Board's inclusion of the nine non-professionals, he cannot be relied upon to refuse to bargain and thus make it possible for the Association to bring a reviewable § 10 proceeding. Nor is it likely that an Engineers Association refusal to bargain for the nine non-professionals would induce the employer to seek review since he would then be free to deal with all employees individually. Nor could we expect such refusal to induce any of the nine non-professionals to seek review. They are hardly likely to insist upon placing their fate in the hands of a reluctant bargaining representative."

There is even less of a possibility for a labor organization which loses a representation election to be able to obtain judicial review of certification decisions under the statutory procedure.

serts that he has no duty to bargain with a certified union can fully protect himself without recourse to the district court. The employer may simply refuse to bargain with the union. Should that cause an unfair labor practice charge to be brought, as is likely, Section 9(d) affords full judicial review of the certification in the court of appeals before the employer is compelled to bargain. In view of Congress' express purpose to make Section 9(d) review an exclusive remedy,<sup>22</sup> there is no reason for invoking the jurisdiction of the district courts on behalf of parties for whom Section 9(d) provides adequate judicial relief.<sup>23</sup>

<sup>22</sup> See *supra*, pp. 13-15.

<sup>23</sup> Two cases in the courts of appeals have held for this reason that *Kyne* can never apply to suits by employers. *Leedom v. International Brotherhood of Electrical Workers*, 278 F. 2d 237 (C.A. D.C.); *Atlas Life Ins. Co. v. Leedom*, 284 F. 2d 231 (C.A. D.C.). See also *Niami Newspaper Pressmen's Union v. McCulloch*, No. 17,459 (C.A. D.C.), July 18, 1963, n. 7, 53 LRRM 2786, 2789.

There is no basis for the district court's conclusion that the statutory review procedure afforded Greyhound by Section 9(d) is an inadequate remedy (1) because it is contingent upon the Union filing an unfair labor practice charge should Greyhound refuse to bargain with it, and (2) because it is more likely that, in the event of a refusal to bargain, the Union would instead "resort to the use of the powerful weapon of picketing" (R. 56). Should the Union be certified as the representative and Greyhound refuse to bargain with it, the Board's experience has shown that it is almost a certainty that a refusal to bargain charge will be filed, rather than that the Union will turn immediately to economic pressure. There is no basis in the record of this case for speculating that the Union here would picket rather than file a charge. Moreover, there is no reason to believe that district court review reduces rather than increases the danger of a strike or picketing by the Union. Despite a district court injunction, the Union and the employ-

Should Greyhound obtain review here, it will in fact have *two* chances to contest the validity of the Board's election order and two chances to delay the commencement of bargaining. For, should the Union obtain certification over Greyhound's objection, Greyhound may refuse to bargain with it and then assert again that it is not an employer as a defense to an unfair labor practice charge. As explained by Senator Wagner, the Act "does not stoop to the folly of holding the Board up twice, once by court review before the election, and then by court review of the order based upon the election."<sup>11</sup>

In *McLeod v. Empresa Hondurena de Vapores, S.A.* (decided with *McCulloch v. Sociedad Nacional*), 372 U.S. 10, the Court of Appeals for the Second Circuit permitted an employer to seek review of representation proceedings in the district court without waiting for the commencement of an unfair labor practice proceeding against him. 300 F. 2d 222. The court of appeals relied, as did this Court in *Sociedad*, upon the danger of offending a foreign government should the employer be compelled to wait to obtain review

ees remain free to resort to a peaceful strike or picketing to vindicate the organizational rights guaranteed by Section 7 of the Act. Indeed, if resolution of the underlying representation question is delayed by district court suits such as the instant one, the likelihood of strikes may be far greater than if the representation proceeding is allowed to run its course and is then reviewed under the statutory procedure. Congress recognized this danger in excluding review under the Act. See H. Rep. No. 972, 74th Cong., 1st Sess., quoted *supra*, pp. 22-23.

<sup>11</sup> Hearings; in 1<sup>st</sup> Leg. Hist. of the NLRA, 1935, p. 1426. See also H. Rep., No. 245, 80th Cong., 1st Sess. (Minority Report), p. 94, in 1 Leg. Hist. of the LMRA, 1947, p. 385.



under Section 9(d). 300 F. 2d at 229. This Court did not specifically decide the jurisdictional question in that case, but vacated the judgment of the court of appeals in light of the decision in *Sociedad* that a union might enjoin the identical representation proceeding. 372 U.S. at 22. There is, in any case, no similar inadequacy of review through Section 9(d) in the present case.

C. THE BOARD HAS MADE NO PLAIN ERROR OF STATUTORY  
CONSTRUCTION

Finally, *Leedom v. Kyne* is not applicable here because the error attributed to the Board concerns the evaluation of the particular facts of this case. District court jurisdiction was found appropriate in *Kyne*, where no factual dispute was involved, because the Board had made an error of statutory construction. Its order was "plainly" "contrary to a specific prohibition in the Act." 358 U.S. at 188, 189. In construing *Leedom v. Kyne*, the courts of appeals have uniformly concluded that it applies only when the Board makes a clear error of general statutory construction—not when there has been an error in evaluating particular facts or where the Board's decision is committed to its discretion.<sup>22</sup>

The alleged error of the Board here was wholly unlike the error in *Kyne*. The Board determined Greyhound to be a joint employer, with Floors, of the porters, janitors and maids working at Greyhound's four Florida terminals. A person is a joint "employer" of

<sup>22</sup> See note 18, *supra*. A separate exception for a Board decision violating constitutional rights was suggested in *Fay v. Douds*, 172 F. 2d 720 (C.A. 2).

particular employees within the meaning of Section 2(2) of the Act when he possesses power to control the terms and conditions of their employment.<sup>32</sup> Whether Greyhound, along with Floors, possessed sufficient control of the employees to qualify as a joint employer in this case was thus a so-called mixed question of law and fact involving not the general meaning of the statute but the application of a generally formulated statutory standard to the particular facts of the case. Such a question is to be treated as one of fact.<sup>33</sup> The employees in this case worked on Greyhound's premises, and Greyhound controlled at least some of their working conditions including, to some extent, their hours of work. The Board's conclusion of joint employment was therefore plainly reasonable.<sup>34</sup>

<sup>32</sup> See *National Labor Relations Board v. Condenser Corp.*, 128 F. 2d 67, 71 (C.A. 3); *National Labor Relations Board v. Long Lake Lumber Co.*, 138 F. 2d 363, 364 (C.A. 9); *West Texas Utilities Co.*, 108 NLRB 407, 413-414, enforced, 218 F. 2d 824 (C.A. 5); *Macy's San Francisco and Seligman & Latz*, 120 NLRB 69; *Panther Coal Co.*, 128 NLRB 409; *Spartan Department Stores*, 140 NLRB No. 59. Cf. *Operating Engineers Local Union No. 3 v. National Labor Relations Board*, 266 F. 2d 905, 909 (C.A. D.C.), certiorari denied, 361 U.S. 834.

<sup>33</sup> See *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504.

<sup>34</sup> The district court seems to have rested its conclusion that Greyhound is not an employer on the premise that Floors is an independent contractor *vis-à-vis* Greyhound and that Greyhound cannot be an employer of employees working for an independent contractor, even though they work at Greyhound's terminals (R. 53). Assuming *arguendo* that Floors is sufficiently independent of Greyhound so that it is not an "employee" or a mere department of Greyhound, that does not mean that Floors could not share control over the workers to an extent which would make Greyhound a co-employer. See cases in footnote 33, *supra*.

*Leedom v. Kyne* has been properly restricted to pure questions of statutory construction, for if it were applied to cases such as this one, involving evaluation of particular facts, the district courts would be compelled to make determinations of fact reserved by the Act to the Board and the courts of appeals. Under the Act, findings of fact are to be made by the Board and are to be reversed in the courts of appeals only when they are not "supported by substantial evidence on the record considered as a whole."<sup>26</sup> Not only did a single district judge, rather than a three-judge court of appeals, review the Board's determination of joint employment here, but the district court's review was not on the record made before the Board and did not observe the substantial evidence test. The district court did not have the Board record before it and it based its determinations in part upon affidavits submitted by Greyhound which were not before the Board.<sup>27</sup> This application of *Kyne* violated Congress' explicit delegation to the Board of authority to make findings of fact in proceedings under the Act, subject only to limited judicial review on the record before the Board.<sup>28</sup>

#### CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be reversed and the case remanded

<sup>26</sup> Sections 10 (e) and (f) of the Act, 29 U.S.C. 160(e) (f).

<sup>27</sup> R. 58, 49-47.

<sup>28</sup> See *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474; *National Labor Relations Board v. Walston Manufacturing Co.*, 369 U.S. 404.

to the district court with instructions to dismiss the complaint for lack of jurisdiction.

Respectfully submitted.

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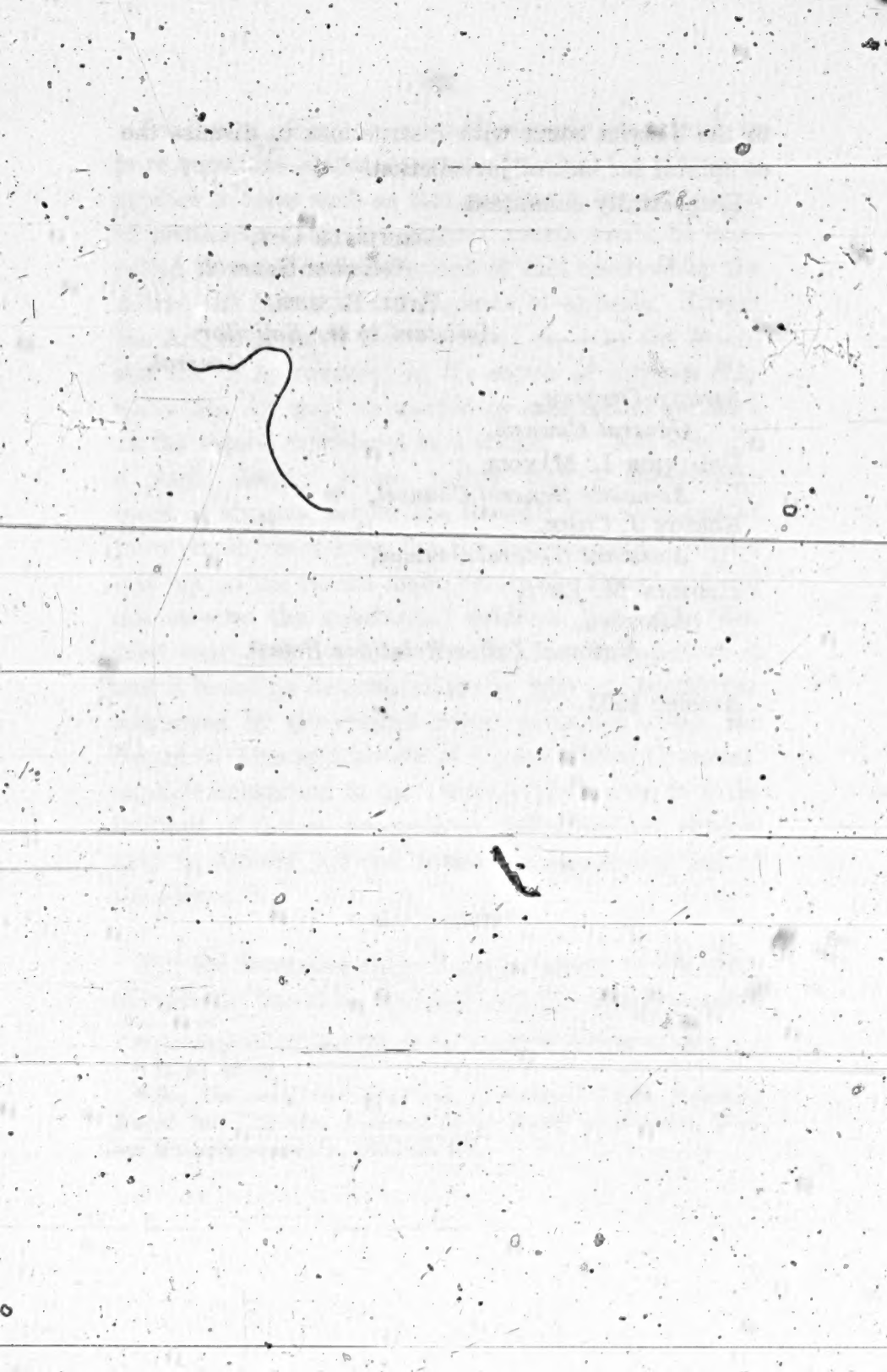
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AUGUST 1933.





## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

° SEC. 2(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

SEC. 2(3). The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time,

or by any other person who is not an employer as herein defined.

SEC. 8(a)(5). It shall be an unfair labor practice for an employer \* \* \* to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

SEC. 8(b)(3). It shall be an unfair labor practice for a labor organization or its agents \* \* \* to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title.

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or sub-

division thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; \* \* \*

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.



(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(c) or 10(f), \* \* \* and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SEC. 10. \* \* \*

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the

court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. \* \* \*

Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as pro-

vided in section 2112 of Title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

\* \* \* \* \*





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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1963

HAROLD A. BOIRE, REGIONAL DIRECTOR,  
TWELFTH REGION, NATIONAL LABOR  
RELATIONS BOARD,

*Petitioner*

v.

THE GREYHOUND CORPORATION,

*Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF AMALGAMATED ASSOCIATION OF  
STREET, ELECTRIC RAILWAY AND MOTOR COACH  
EMPLOYEES OF AMERICA, AFL-CIO, AS AMICUS  
CURIAE SEEKING REVERSAL**

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**BRIEF OF AMALGAMATED ASSOCIATION OF  
STREET, ELECTRIC RAILWAY AND MOTOR COACH  
EMPLOYEES OF AMERICA, AFL-CIO, AS AMICUS  
CURIAE SEEKING REVERSAL**

**INTRODUCTORY STATEMENT**

With the consent of the parties hereto, copies of which consent have been filed with the Clerk of this Court, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO (hereinafter "Amalgamated"), submits this brief as amicus curiae, and requests the Court to reverse the judgment of the Court below.

Amalgamated is the labor organization which petitioned for the representation election directed by the National Labor Relations Board, the conduct of which was enjoined by the District Court, in an order which was affirmed by the Court below. As such, Amalgamated has a direct and vital interest in the review of the decision of the Court below. Amalgamated also expresses the interest of the employees



involved in this proceeding who, since April 17, 1961 (when the representation petition was filed), have sought to be represented in collective bargaining, and are being denied the opportunity to select a collective bargaining representative by the holding of the Court below.

### OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Fifth Circuit (R. 71) is reported officially at 309 F.2d 397.

The opinion of the District Court (R. 52) is reported officially at 205 F. Supp. 686.

### JURISDICTION

The Petition For A Writ of Certiorari was granted by this Court April 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

The jurisdiction of the District Court was based upon 28 U.S.C. § 1337.

### QUESTION PRESENTED

Petitioner limits the question presented to the threshold issue (P. 2):

"Whether a district court has jurisdiction, at the suit of an employer, to enjoin a representation election directed by the National Labor Relations Board."

Amalgamated agrees that this threshold question is of great importance and, for all of the reasons stated by Petitioner in its brief, Amalgamated believes that this Court should reverse the judgment of the Court below and rule that the District Court was without jurisdiction to enjoin the representation election here involved.

However, Amalgamated believes that if this Court were to conclude the District Court had jurisdiction to enjoin the representation election, a further question is presented on

the record herein, a question which must be considered for a proper disposition of the case.

Did the Court below err in concluding that the Board had exceeded its statutory authority in directing the instant representation election?

It is to this latter question that this brief is directed.

### **STATUTORY PROVISIONS INVOLVED**

The pertinent statutory provisions involved in this cause are set out in the appendix to the brief of Petitioner. (P. 33-38)

### **STATEMENT OF THE CASE**

The case is as stated in the brief of Petitioner (P. 3-5). For the purposes of brevity, Amalgamated adopts that statement as its own.

### **ARGUMENT**

**The Petitioner Properly Determined On The Record Before It That Respondent Was A Joint Employer Of The Employees Involved Herein, And The Courts Below Erred, As A Matter Of Law, In Setting Aside That Determination And In Enjoining The Representation Election Ordered By Petitioner.**

The Board found that "in view of the common control over the employees sought, we find both Greyhound and Floors to be their joint employer." (R. 68)

The District Court (whose reasoning was adopted by the Court below), in enjoining the election directed by the Board, stated that:

The Court is of the opinion that the findings of the Board, as recited are, as a matter of law, insufficient to create a joint employer relationship with respect to the employees in said unit; but that, on the contrary, said findings establish as a matter of law that Floors, Inc., is an independent contractor and, for the purposes of collective bargaining, its employees are not the employees of the plaintiff. (R. 53).

The basic fallacy in this reasoning is that it assumes that if it is determined that Floors stood in the relationship of an independent contractor with respect to Greyhound, the Board was precluded from establishing a bargaining unit based on a *joint employer* relationship between Greyhound and Floors. There is no basis in the statute or in the authorities for that assumption. The Board, in the decision here involved, has said, in effect, that even if it be assumed that Floors is an independent contractor, Greyhound maintains such a degree of common control over the particular employees in question as to warrant the conclusion that Greyhound and Floors are joint employers of those employees, and to warrant the establishment of a collective bargaining unit coextensive with that joint employer relationship.

Such an approach is clearly sanctioned by the Act. Section 9(b) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*) provides:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the *employer* unit, craft unit, plant unit, or subdivision thereof . . . [Emphasis added.]

In Section 2(2), the Act defines "employer" to include "any person acting as an agent of an employer, directly or indirectly."

With that aspect of the definition of "employer" in mind, the Board has for many years directed elections in bargaining units comprising more than one company, even though the companies may be separate legal entities, or stand in the relationship of principal and independent contractor, where there is a substantial degree of common control over essential elements of the employment relationship of the employees in the bargaining unit.

One example of this approach can be found in a line of Board decisions in representation cases involving depart-

ment stores which lease certain of their departments to a separate and independent enterprise. Where the facts demonstrate that the firm which owns and operates the store maintains a substantial degree of control over some of the critical aspects of the employment relationship, even though in other respects the lessees retain complete control, the Board has found both the store operator and the lessee to constitute joint employers, and has directed elections, exactly as it did here, in a unit of the employees who are subject to that joint control. See *Franklin Simon & Company, Inc. and Kaysport Newport, Inc.*, 94 N.L.R.B. 576; *Macy's San Francisco and Seligman and Latz, Inc.*, 120 N.L.R.B. 69; *Spartan Department Stores*, 140 N.L.R.B. No. 59; cf. *Frostco Super Save Stores, Inc.*, 138 N.L.R.B. No. 14.

In like fashion the Board has consistently established a single, multi-employer bargaining unit comprised of several otherwise wholly independent companies which, by a history of formal or informal participation in joint collective bargaining, have demonstrated a common control over the employment relationship. See *Associated Shoe Industries of Southeastern Massachusetts, Inc.*, 81 N.L.R.B. 224; *Bunker Hill & Sullivan Mining & Concentrating Co.*, 89 N.L.R.B. 243; *Research Craft Manufacturing Corp.*, 129 N.L.R.B. 723; *Molinelli, Santoni & Freytes*, 118 N.L.R.B. 1010.

The question of whether the term "employer," as that term is defined in the Act, may embrace more than one independent entity has frequently arisen in cases posing the issue of the liability of one company which has engaged in conduct affecting the employees of another company which, if committed by the other company, would constitute an unfair labor practice against those employees.

Such was the issue presented in *West Texas Utilities Company*, 108 N.L.R.B. 407. In that case, West Texas had contracted with Southwest Electric Company for some work to be performed at a power plant operated by West Texas. Southwest was required by its agreement with West Texas to furnish materials and labor, although West Texas re-



served the right to require Southwest to "remove any employee from the work." West Texas was instrumental in having Southwest remove one Ray, an employee of Southwest, from the project under circumstances in which the Board found that Ray had been discriminated against because of his union activity. In ruling that West Texas was responsible for the unfair labor practice, the Board said:

Moreover, we find that under the contractual relationship of the parties, the Respondent was an employer of Ray, within the meaning of Section 2(2) of the Act, which provides, in part, that "the term 'employer' includes any person acting as an agent of an employer, directly or indirectly." The Respondent contends, and we agree, that the relationship of Southwest to the Respondent was essentially that of an independent contractor. Normally, under such an arrangement, responsibility for the hire, pay, and discharge of employees on the job would be vested in Southwest. Notwithstanding, in the present case an important part of the responsibility was delegated to the Respondent in the contractual clause which authorized the Respondent, in its discretion, to control the tenure of Southwest's employees on the project. We conclude that in practical effect Southwest thereby designated the Respondent to act as its agent with respect to preventing or terminating the employment of any person who worked on the project. We accordingly find that the Respondent, in preventing Ray from being employed on the project, was acting as the agent of Southwest and is therefore responsible for the resultant unlawful discrimination:

Finally, in our opinion, the relationship between Southwest and the Respondent could alternatively be viewed as that of dual employers insofar as the hire and tenure of employees on the project was concerned, with Southwest having the primary right to hire and discharge and the Respondent having the contractual right to veto Southwest's determination in these matters. Thus, the Respondent controls to a substantial degree a most significant aspect of the employment relationship of persons on the project and we believe that it is an employer at least of persons, like Ray, over whom it effectively

exercises such control. 108 N.L.R.B. at 413-414. (Emphasis added)

The Court of Appeals for the Fifth Circuit, the Court below in the instant matter, enforced the decision and order of the Board in a *per curiam* opinion, *N.L.R.B. v. West Texas Utilities Company*, 218 F.2d 824 (C.A. 5), *cert. denied*, 349 U.S. 953. In so ruling, the Court acted in accord with two earlier decisions by that Court. In *N.L.R.B. v. Calcasieu Paper Company*, 203 F.2d 12, 13 (C.A. 5), the Court enforced an order of the Board, noting, with approval, that:

Although the respondent companies are legally separate and distinct, the Board found that they constituted a single employer for the purposes of the Act.

A similar order of the Board was enforced by that Court in *N.L.R.B. v. Concrete Haulers, Inc.*, 212 F.2d 477, 479 (C.A. 5), where the Court stated:

The evidence is clear that the two respondents constitute one employer within the meaning of the National Labor Relations Act. Where, in fact, the production and distribution are one enterprise, that enterprise as a whole is responsible for compliance with the Act, regardless of the corporate arrangements between themselves. The interdependence and integrated nature of the operations of the respondents, the common ownership of the stock, and the fact that the same officer administers a common labor policy, clearly indicate that there is only one employer for the purposes of this Act. *N.L.R.B. v. Condenser Corporation*, 3 Cir., 128 F.2d 67.

It will be noted that in *Concrete Haulers* the Court enforced, *inter alia*, an order of the Board directing the joint employers to bargain in a unit co-extensive with the joint employer relationship.

In the *Condenser* case cited by the Court in *Concrete Haulers*, the Court of Appeals for the Third Circuit, stated the proposition in these terms (128 F.2d at 71):

Under these circumstances we believe the relationship of these two corporations is such that an order pur-

suant to the provisions of the statute is proper against both, in view of the careful limitation which the Board has made with regard to the discharges. This is in no sense a penalty against the parties for an arrangement which is deemed by them to be in the interests of efficiency. It simply rests on the premise that where in fact the production and distribution of merchandise is one enterprise, that enterprise, as a whole, is responsible for compliance with the Labor Relations Act regardless of the corporate arrangements of the parties among themselves. What is important for our purpose is the degree of control over the labor relations in issue exercised by the company charged as a respondent. *Press Co., Inc. v. National Labor Relations Board*, 1940, 73 App. D.C. 103, 118 F.2d 937. Regardless of what Cornell says concerning its connection with Condenser's employees it appears that "together, respondents act as employers of those employees \* \* \* and together actively deal with labor relations of those employees." *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 1938, 303 U.S. 261, 263.

See also *N.L.R.B. v. Gibraltar Industries, Inc.*, 307 F.2d 428 (C.A. 4), cert. denied, 372 U.S. 911.

Manifestly, therefore, the Board, having found that Greyhound and Floors exercise common control over the employees sought to be represented in this proceeding, acted properly and in accord with well established precedent in ruling that Greyhound and Floors were joint employers of these employees and in directing an election in an "employer" unit which embraced such of the employees of these two companies as are subject to this common control. The District Court and the Court below ignored the statutory provisions and precedents discussed above, and erred in concluding that an election on the basis of the joint employer relationship may not be directed if the facts show that Floors was an independent contractor.

What remains is the question of whether the Board acted reasonably and on the basis of evidence in concluding that there was "common control over the employees sought." Amalgamated submits that on that score the Board was

correct beyond any possible doubt. The "short form" decision of the Board only sets forth some examples of the wealth of evidence in the record before the Board in support of that conclusion. What is set forth is sufficient to sustain that conclusion. However, should there be any doubt, Amalgamated will, in what follows herein, summarize the uncontroverted evidence that was before the Board showing the relationship between Greyhound and Floors as it affects the employees involved in this case.<sup>1</sup>

In this case Amalgamated sought a unit comprised of all porters, janitors, and maids employed at the bus terminals operated by The Greyhound Corporation (Southern Greyhound Lines Division) in Miami, St. Petersburg, Tampa, and Jacksonville, Florida.

In the operation of its interstate bus system, Greyhound maintains a number of terminals at which, in addition to ticket agents, baggage agents and related classifications, Greyhound utilizes the services of personnel classified as porters, janitors, and maids. (R.B. 118.)

Amalgamated represents, with a few exceptions, all of the drivers, maintenance employees, and terminal employees, of Greyhound. The current collective bargaining agreement between Greyhound and Amalgamated covers all of these classifications, and specifically covers the classifications of porters, janitors and maids. (R.B. 16-17, 19-20.). Thus, Amalgamated presently represents all porters, janitors, and maids at all of the terminals operated by Greyhound other than the four that are involved in this proceeding. (R.B. 231-233.)

<sup>1</sup> In the summation of the evidence which follows, references designated "R.B." are to the transcript of the testimony before the Board in this proceeding. This transcript is not now before this Court as part of the record certified to the Court. However, if this Court reaches this issue, and if it believes it necessary to review the record on which the Board's decision was based, a certified copy of that transcript has been lodged with the Clerk of this Court. Much of the evidence—particularly the actual agreements between Greyhound and Floors—is in the record now before the Court.



In the case of the four terminals here involved—the terminals in Miami, St. Petersburg, Tampa, and Jacksonville—Amalgamated had represented the porters, janitors, and maids as part of its overall unit until the time, commencing in 1954, when Greyhound entered into contractual arrangements with Floors to have the porter, janitor and maid work in those terminals performed by employees on the payroll of Floors. (R.B. 23.)

Floors is a wholly owned subsidiary of a Georgia corporation, engaged in the business of providing a great variety of building cleaning, maintenance, and allied services. (R.B. 240-246.)

The history and details of the contractual arrangements between Greyhound and Floors pertaining to the four terminals involved can be summarized as follows:

1. On November 11, 1954, these parties entered into a written agreement<sup>2</sup> with respect to the terminal in Jacksonville. In that contract:

(a) Floors agrees to "provide and perform twenty-four (24) hour daily janitorial and loading services" at the terminal in question "in accordance with the description and definition of work" set forth in a statement (designated as "Schedule A") attached to the agreement. That statement describes in minute details just what cleaning services will be performed, and specifically notes that the daily cleaning services would be repeated as needed for proper results "by discretion of contractor . . . and in agreement with *The Terminal Management*" i.e., in agreement with Greyhound. [Emphasis added.] (R. 16, 20)

(b) So far as the porter work is concerned, the statement attached to the schedule provides that Floors will supply "supervised labor, in uniform *approved by the Terminal Management*, in total amounts of man-hours daily to ac-

<sup>2</sup> The terms of this agreement are set forth in the instant Record at pp. 16-23.

comply with the *normally practiced services in the Greyhound Bus Terminal*" involving the handling of all baggage and express shipments, the loading and unloading of buses, and certain duties in connection with the servicing and cleaning of buses. [Emphasis added.] (R. 21)

(c) The contract provides for a minimum number of man-hours that will be supplied by Floors; but, more than that, it sets forth in the attached "Schedule A" a specific schedule of *individual assignments* of the employees to be supplied by Floors, *stating just what hours those employees will work each day and what their days off will be*. What is more, it provides that any change in that schedule are "*subject to the approval of the Terminal Management*." [Emphasis added.] This point is further emphasized in the body of the agreement (Section 2) which states that Floors agrees "*that all work provided for herein shall be performed on schedule to the satisfaction of the terminal management*." [Emphasis added.] (R. 16)

(d) Greyhound, in that first agreement, agreed to pay Floors a flat sum, payable weekly, with the understanding that the stipulated amount would be reduced proportionately if there were any reductions in the man-hours per week below the agreed upon minimum established by Schedule A. Then, plainly recognizing that the agreement between the parties was really one for the supplying of specific hourly labor, the agreement provided (in Section 5) that Floors would keep detailed cost records and after a period of experience would "*promulgate an hourly rate for services performed*" to be offered for acceptance by Greyhound if it results in lesser cost than the flat weekly compensation. (R. 20)

(e) The agreement is *terminable by either party at will by thirty days' written notice*, with the further right of Greyhound to terminate without any notice "*if unforeseen difficulties arise due to the existence of labor contracts*." (R. 18)

2. On March 3, 1956 Greyhound and Floors entered into

an amendment<sup>3</sup> of the 1954 Jacksonville agreement. In that contract:

(a) The schedule of hours of work to be supplied by the employees provided by Floors was changed "in fulfillment of said altered schedule as set forth this date *by the Terminal Manager of the Jacksonville Greyhound Terminal.*" The parties then reaffirmed their agreement that the schedule of hours worked "shall be increased or decreased *by direction of the Terminal Manager, only,*" and provided for a specific hourly rate that would apply with respect to any increase in regularly scheduled hours over and above the agreed upon minimum that the terminal manager of Greyhound might authorize. [Emphasis added.] (R. 24)

(b) The parties then dealt with the problem of using the employees involved on overtime work. They were very specific in providing that all hours of overtime work "*shall be directed to be used, affected and operated as such by the Jacksonville Greyhound Terminal Manager, only.*" Not only did the parties agree that Greyhound would control the amount of overtime that would be worked; they even provided in the agreement for the precise premium that would be paid to any employee working overtime (see Section D, 1, (a) and (b)), and they provided (in Section E) that the approval of overtime by Greyhound would be in terms of *specific employees*. [Emphasis added.] (R. 28, 29)

3. On September 28, 1956,<sup>4</sup> Greyhound and Floors further amended their agreement with respect to the Jacksonville terminal. In that amendment the parties changed the method of compensation to what they termed a "cost-plus arrangement." Actually, however, it is clear that this is not a cost-plus arrangement in the usual sense of the term in which the contractor bills for all actual costs incurred, plus an agreed-upon percentage over and above those costs. Here, the agreement of September 28, 1956 (which must,

<sup>3</sup> This amendment is set forth in the Record. (R. 23-26)

<sup>4</sup> This amendment is set forth in the Record before this Court at pp. 27-31.

of course, be read in the light of those provisions in the earlier agreements that were not modified), provides for a fixed maximum payment to be made by Greyhound for *each element* of the cost *including labor*. Thus, the agreement provides that the maximum weekly amount that is guaranteed is \$1,519.52, of which 72 percent represents the charge for labor, and any deviations from that guaranteed amount must conform to the percentage progressions. *Only such labor cost as is authorized by Greyhound may be charged for*, and above that Floors adds 28 percent for overhead and profit.

Here we have one of the most significant facts in this case, for this is the picture that emerges when we look at the contractual arrangement involved: Greyhound, by having to approve the work schedules, determines the number of porters, maids, and janitors that will be employed. Greyhound determines the minimum number of hours that these employees will work, and the extent to which any of them will work overtime. Greyhound determines the maximum it will pay for the total of all hours worked. As a result, in the clearest possible way, *Greyhound and not Floors, determines the wages of the employees we are concerned with in this case.*

4. On November 13, 1957,<sup>5</sup> Greyhound and Floors entered into an agreement to provide the same kind of services in the Miami terminal. In that contract the parties agreed to terms identical to those established with respect to the Jacksonville terminal. Plainly indicating the continuation of the principle that Greyhound fixes the work schedule of the particular employees involved is the statement in the letter from Greyhound to Floors that (R. 32):

We further agreed that you would have one of your representatives meet me in Miami on November 22 to set up the work shifts and that it would be impossible to draw up a contract until we had worked our work

<sup>5</sup> This agreement is set forth in the Record before this Court at pp. 32-33.



shifts out and know the exact number of employees or manhours that you would have to furnish us.

The letter further makes it clear that the amount that Greyhound will pay to Floors will be directly related to the wage rate that Floors will pay to the employees involved. No profit is to accrue to Floors by being able to obtain labor at a rate less than it then anticipated; such savings are to be passed on directly to Greyhound. (See the fourth paragraph of the letter agreement of November 13, 1957, R. 32-33)

Finally, the agreement makes it clear that the Miami agreement, like the one in Jacksonville, is to be *terminable at will*. (R. 33)

5. On January 24, 1958, Floors and Greyhound entered into an agreement applicable to the terminals in Tampa and St. Petersburg on exactly the same terms as those which were agreed to in the case of the Jacksonville and Miami terminals.\*

Many of the porters, janitors, and maids now employed in the four terminals in question and covered by the instant petition are the same individuals who were employed before their work was "transferred" to Floors. (R.B. 148, 214, 224, 227-228.) And it is undisputed that the work of porters, janitors, and maids in these four terminals has continued to be performed in precisely the same manner as it had been done before, and as it continues to be done in all of the other terminals of Greyhound. (R.B. 34, 209, 276.)

The porters, janitors, and maids here involved punch the same time clock as is used by other Greyhound employees. (R.B. 101, 158, 222.) They wear uniforms identical in appearance to that worn by comparable employees of Greyhound in the other terminals except for the fact that they have very recently been required to add the insignia "Floors Inc. of Florida" to their shirts. (R.B. 62, 153.) Despite that

\* This agreement is set forth in the Record before this Court at p. 34.

additional designation, many of the porters continue to wear Greyhound insignia on their caps, a fact known to representatives of Floors and of Greyhound. (R.B. 62-63, 170.) Employees in the four terminals in question here supply their own uniforms, which is also true of porters, janitors, and maids in all other terminals operated by Greyhound. (R.B. 61, 152, 170.)

It is self-evident, and amply supported by the record, that the work performed by all of the employees covered by this petition comprises an *integral and essential part of the business of Greyhound*. The operator of an interstate bus system may or may not provide restaurant service in its terminals. It may or may not provide lockers, or a newsstand, or pin ball machines in its terminals. It may or may not provide a pillow service for the passengers on its buses. But it *must* provide a terminal that is kept presentable; it *must* load and unload the baggage of its passengers which it *must* carry and it *must* load and unload the express shipments, newspapers, etc., which are shipped by its freight customers, and which it *must* accept for shipment. This is not only a matter of sound business judgment; it is required by the laws and regulations under which a bus system such as Greyhound operates. (R.B. 32-33, 106-111.)

What is more, as the record also clearly establishes, passengers or shippers who have claims for damage to baggage or express shipments look to *Greyhound and not to Floors* for recovery. Floors carries no insurance to cover such claims; Greyhound accepts all responsibility in that area. Greyhound recognizes that it is still responsible and it makes no effort to advise any passengers or express customers that their baggage and express is being handled in Miami, Tampa, St. Petersburg or Jacksonville by employees with any different status than that of the porters in any other terminals. (R.B. 30-31, 91, 126, 127-129.) It stands to reason that when a passenger deals with a porter in one of those four terminals he assumes that he is dealing with a *Greyhound* porter. He is in a *Greyhound* terminal. He

knows nothing of an entity known as "Floors, Inc." and he looks to *Greyhound* for the service he expects. (R.B. 278-279.)

Under these circumstances, it is reasonable to expect to find that in the four terminals where it has contracted with Floors, Greyhound *retains complete, specific, and detailed control over the manner in which the work performed by the personnel supplied by Floors is performed.* And that is precisely what obtains. We have already seen above how the basic written agreements between Greyhound and Floors give Greyhound complete control over the number of employees that will be utilized, the shifts they will work, the overtime that will be worked, and the wages that will be paid. The record demonstrates that in practice that control is in fact exercised. The Greyhound terminal managers determine the exact number of employees that will be used on each shift; they must approve of any overtime payments or the use of extra help (R.B. 30, 44-45, 53-55, 75, 99-100, 114, 123-125, 131-132, 160-163); and the president of Floors admitted at the hearing that *he would have to obtain the approval of Greyhound before he could give his employees working in the Greyhound terminal a wage increase.* (R.B. 252-253.)

Nor is that control limited to matters affecting the number of employees and their compensation. Floors has a supervisor in Miami, in Jacksonville, and one who covers both Tampa and St. Petersburg; but in each instance that supervisor is also responsible for the supervision of other Floors projects; in no instance is he present in the Greyhound terminal at all times; and the record shows that several days may pass in which the Floors supervisor is not present in the Greyhound terminal at all. (R.B. 87, 88, 147, 211-212, 218, 277.) But more important is the fact that Greyhound, despite its agreement with Floors, regards the Greyhound terminal manager as the boss of the terminal, responsible in every way for the work performed by all employees in the terminal whether they are paid by Greyhound or paid

by Floors. In that connection, the ranking Greyhound official testified at the hearing as follows:

"Q. Well, let's examine into this supervisory business. Do they [the Greyhound Terminal Managers] concern themselves at all with how the baggage is handled and how the express is handled and what procedures and so forth will be followed?

"A. Certainly if the job is not being handled properly they concern themselves with it because they are still managers of the terminal.

"Q. Right, do they instruct Floors, Incorporated, as to how they want that work done?

"A. They do, Floors, Incorporated, supervisors.

"Q. Do they tell them specific details as to how that work will be done?

"A. Why sure." (R.B. 35.)

Greyhound makes no distinction in the standard of conduct, or in the details of performance, that it expects of the personnel supplied by Floors as compared to that of other identical employees in the other terminals that it operates. (R.B. 8-70.) As evidence of the fact that Greyhound maintains complete control over the way in which the work is done by personnel supplied by Floors, the record shows:

1. That the Greyhound terminal managers give, orally or in writing, specific and detailed instructions to the Floors supervisors as to how they want the work done and what changes they want in the manner in which the job is done. When written instructions are issued by the Greyhound terminal managers, the Floors supervisors post them, and the porters, janitors, and maids are expected to read and comply with those instructions. (R.B. 88-89, 93-99.) A review of the examples of specific instruction set forth in the cited record references readily demonstrates that they cover not just the end result but *the precise manner in which the end result to be achieved.*

2. That all parties understand that where there is a conflict between any instructions the terminal manager has is-



sued and any the Floors supervisor has promulgated the employees are expected to comply with the instructions of the Greyhound terminal manager. (R.B. 60-61, 112, 148-151.)

3. That on many occasions—particularly, of course, when the Floors supervisor is not present—the employees in question receive their instruction and supervision directly from the terminal managers or from other Greyhound employees. (R.B. 105, 116-117, 199-201, 210-211.) As one Greyhound official testified: "Of course, we are in the business of handling passengers and somebody would have to tell that Floors' porter what to do." (R.B. 59.)

4. That the Greyhound terminal managers have the authority (and have exercised the authority) to order Floors to remove an employee that they consider undesirable and no longer wish to have employed in the terminal. On no occasion has such an order been refused. (R.B. 36, 90-92, 177, 193.) In the same manner, Greyhound terminal managers have the authority to refuse to permit Floors to hire an employee it considers undesirable for employment in any of the Greyhound terminals. (R.B. 36-37.)

On the record before the Board, as summarized above, the finding by the Board that Greyhound and Floors exercise common control over the employees involved is more than justified. Indeed, it is the minimum that the Board could find. For, on that record, we submit that the Board would have been eminently justified in concluding that Floors was not an independent contractor, and that Greyhound was the real employer of the employees involved. See *Island Services, Ltd.*, 50 L.R.R.M. 1213 (N.L.R.B. 1962).<sup>1</sup> The Court of

<sup>1</sup> The decision in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO v. Greyhound*, 231 F. 2d 585 (C.A. 5), does not require a different result. The sole issue in that case was whether Greyhound had violated its agreement with Amalgamated by entering into the contract with Floors. The issue of whether Floors was an independent contractor within the meaning of the Act had not been litigated in the lower Court, and the facts which show the extent to which Greyhound controls not only the end result but the means by which that result is accomplished had not then been known.

Appeals for the Fifth Circuit, in accord with well established precedent, has noted that:

It is generally stated in the authorities that the distinction between an independent contractor and an employee is found in the nature and the amount of control reserved by the person for whom the work is done. And that an employment relationship exists "whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished..." *N.L.R.B. v. Steinberg*, 182 F.2d 850, 855 (C.A. 5).

It would be difficult to conceive of a case in which the person for whom the services are performed retains more complete control over the manner in which the work is performed. In its arrangement with Floors, Greyhound has done no more than add a level of routine supervision over the porters, maids and janitors that did not exist before. The fact that the work involved is an on-going, integral part of Greyhound's business and not just an incidental related aspect, the fact that the work is done on the premises of Greyhound and integrated with the work of other Greyhound employees, the fact that the work is identical to that performed in other Greyhound terminals and is the same as was done by these employees while on Greyhound's payroll, the fact that Greyhound determines the number of employees that are used, the shifts they will work, and the amount of overtime that will be worked, the fact that Greyhound retains the right to prohibit Floors from employing in its terminals any particular employees Greyhound does not desire, the fact that Greyhound effectively determines what wages will be paid to the employees, leaving to Floors not a risk-type profit, but a fixed fee for overhead and administration, the fact that Greyhound continuously instructs Floors supervisors as to the most minute details concerning the performance of the work with the understanding that those instructions will be conveyed to the employees, the fact that Greyhound officials themselves have frequent occasion to directly supervise the work, particularly on the regularly occurring instances when Floors super-

visors are not present, and the fact that the contract between Greyhound and Floors is terminable at will—all these lead inescapably to the conclusion that Greyhound retains that degree of control over the means and manner in which the result is accomplished which negates any independent contractor relationship.

Amalgamated commands to the attention of this Court a well reasoned District Court opinion in a case involving the contracting out of terminal work by a sister subsidiary of the Greyhound Corporation. In *Walling v. Southwestern Greyhound Lines*, 65 F. Supp. 52, the Court dealt with an alleged violation of the Fair Labor Standards Act by an individual (A. F. Sink) with whom Southwestern Greyhound had entered into an agreement for the operation of one of its terminals. Southwestern Greyhound disclaimed any liability on the ground that Sink was an independent contractor and that the terminal employees involved were employees of Sink and not of Southwestern Greyhound. On facts which are certainly no more persuasive than those involved here, the Court rejected this contention and found that Sink and his employees were employees of Greyhound under the very same common law test that is applicable here. The Court said (65 F. Supp. at 55):

From the facts above stated no conclusion can be reached other than that Sink is an employee of defendant and not an independent contractor. Notwithstanding the broad definition of an "employee" within the meaning of the Fair Labor Standards Act, under such facts, Sink is an employee of defendant even when measured by the standards of the common law. Under its contract with Sink defendant had the "right to control" Mr. Sink as to the details of the duties performed by him in the operation of its depot. Its District Passenger Agent and Auditor make recommendations and gave to Mr. Sink orders concerning the conduct of the business at the depot. In its contract defendant specifically retained "control of expenses" incurred in the operation thereof. Defendant provided the means by which Mr. Sink and the other employees at the depot perform their duties. The occupation, in which Mr.

*Sink and said other employees were engaged, was not distinct in character, separate and apart from defendant's general interstate business but was an integral and essential part thereof. The occupation of Mr. Sink was one that is usually performed by a Station Master and required no particular skill. Defendant furnished and supplied the instrumentalities and the place where such duties were performed. The method of paying Mr. Sink's compensation and the term of his employment were continuous. He was not paid by the job nor for specified duties; he was paid to operate the station in accordance with the usage and custom of defendant's public carrier business and all of his activities and duties, as well as those of the other employees at said depot, were amenable to the custom and control defendant exercised over its entire interstate business. Defendant's tariffs and its operating schedules were dependent, in part, on the duties performed by Mr. Sink and the other employees at said depot. Under such circumstances Mr. Sink is and was an employee of defendant under the common law. *Skidmore v. Haggard*, 341 Mo. 837, 110 S.W. 2d 726; *Barnes v. Real Silk Hosiery*, 341 Mo. 563, 108 S.W. 2d 58; *State ex rel' Chapman v. Shain*, 347 Mo. 308, 147 S.W. 2d 457; Restatement of the Law of Agency, Vol. 1, p. 483. Mr. Sink, being an employee of defendant under common law standards determining that relationship, there can be no question that he is an employee of defendant within the meaning of the Fair Labor Standards Act. *National Labor Relations Board v. Colten*, 6 Cir. 105 F.2d 179; *National Labor Relations Board v. Blount*, 8 Cir. 131 F.2d 585; *Southern Ry. Co. v. Black*, 4 Cir. 127 F.2d 280. [Emphasis added.]*

The Board could well have found that Floors was not an independent contractor with respect to the particular employees here involved. *A fortiori*, it acted reasonably and properly in determining that Greyhound and Floors exercise such a degree of common control as warrants treating the two companies as joint employers of these employees, and justifies the establishment of a collective bargaining unit coextensive with that joint employer relationship.



**CONCLUSION**

We respectfully submit that, for all of the reasons stated in the Brief of Petitioner, the decision of the Court below should be reversed on the jurisdictional ground urged by the Petitioner. If, however, this Court should rule that the Court below did not err in affirming the jurisdiction of the District Court, we submit that it should then rule, for the reasons stated in this brief, that the Court below erred in concluding that the Board had exceeded its statutory authority in directing the instant election.

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1963

**No. 77**

HAROLD A. BOIRE, REGIONAL DIRECTOR,  
TWELFTH REGION, NATIONAL LABOR  
RELATIONS BOARD,  
*Petitioner,*

VS.

THE GREYHOUND CORPORATION,  
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF FLOORS, INC., AS AMICUS CURIAE**

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**OCTOBER TERM, 1963.**

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**HAROLD A. BOIRE, REGIONAL DIRECTOR,  
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---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FIFTH CIRCUIT**

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**BRIEF OF FLOORS, INC., AS AMICUS CURIAE**

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**I. INTRODUCTORY STATEMENT**

**A. Consent of Parties to Filing of Amicus Curiae Brief**

Pursuant to Rule 42(2) of the Rules of the Supreme Court, Floors, Inc. (hereinafter referred to as "Floors"), sought consent of the parties to this case to the filing by

Floors of an *amicus curiae* brief. Such consent of the parties was received by letter of May 6, 1963, from the Solicitor General, as counsel for Petitioner; and by letter of May 7, 1963, from counsel for Respondent. These letters of consent have heretofore been filed with the Clerk of the Supreme Court.

#### B. Statement of the Case

The case at bar is the culmination of a proceeding instituted on April 17, 1961, in which Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO (hereinafter referred to as "Amalgamated"), filed a petition (TR. 65)<sup>1</sup> with the National Labor Relations Board (hereinafter referred to as the "Board") seeking to represent for purposes of collective bargaining certain employees of Floors who were then working in Greyhound bus terminals in Miami, Tampa, St. Petersburg, and Jacksonville, Florida. On May 25, 1961, Amalgamated filed an amended petition (TR. 66) naming Southeastern Greyhound Lines (hereinafter referred to as "Greyhound") and Floors as co-employers of the employees involved.

On May 3, 1962, the Board issued a Decision and Direction of Election (TR. 67) finding Floors and Greyhound to be co-employers of the employees in the unit petitioned for by Amalgamated. On May 23, 1962, Greyhound filed suit in the United States District Court for the Southern District of Florida seeking to enjoin the election ordered by the Board. On June 12, 1962, the District Court permanently enjoined the Regional Director from holding the election. The District Court's Opinion (TR. 52-59) will be discussed in detail below. Upon appeal, the Court

1. References to the Transcript of Record are designated as "TR."

of Appeals for the Fifth Circuit affirmed the decision of this District Court (TR. 71), and this Court thereafter granted certiorari (TR. 73).

At all stages of this proceeding, Floors has contended that it is the sole employer of all of its employees in the State of Florida, and that a decision to the contrary would act to completely deprive Floors of the right to conduct its labor relations and control its employee complement in the manner essential to its type of business. The interest of Floors in the instant proceeding is, therefore, quite clear. It is simply to retain a right which, prior to the decision of the Board, was thought to inhere in every private business—that is, the right to manage its affairs free from interference and control of another private corporation under the mandate of a governmental agency.

#### **C. Scope of This Amicus Curiae Brief**

The primary issue in the case at bar is whether or not the District Court erred in enjoining the Board from holding a representation election. This, in turn, involves two sub-issues: first, whether or not a district court has jurisdiction to enjoin a Board election which is ordered illegally by the Board; and, secondly, whether the Board exceeded its statutory powers in directing the election involved in the instant case.

We respectfully submit that the District Court, under the principles enunciated by this Court in *Leedom v. Kyne*, 358 U.S. 184, was fully authorized to enjoin the election on the ground that the Board had acted in excess of its statutory powers in directing the election. The reasons for the correctness of the District Court's ruling on the jurisdictional question are set forth fully in Judge Lieb's Opinion (TR. 52) and in Respondent's brief before this

Court. Accordingly, we will not attempt to repeat what was there said concerning the jurisdictional issue.

This *amicus curiae* brief of Floors will be confined to the question of whether or not the Board exceeded its statutory authority in finding Greyhound and Floors to be co-employers of the employees here involved. It is respectfully submitted that the law applicable to the undisputed facts of this case positively demonstrates the correctness of the decisions below in the District Court and Court of Appeals.

## II. SUMMARY OF ARGUMENT

Section 8(a) (5) of the Labor-Management Relations Act, 1947, as amended, the section which establishes the duty to bargain collectively on the part of an employer, provides that an employer must bargain collectively with the representatives of his employees. The Act imposes no duty on a company to bargain with the representative of employees of another employer.

Prior to 1947, the Board applied an extremely broad interpretation to the term "employee" as used in the Act, even going so far as to hold independent contractors to be "employees" under the Act. Congress expressed its disapproval of this interpretation in its passage of the 1947 Labor-Management Relations Act and in fact amended the statutory definition of "employee" so as to exclude independent contractors therefrom. Since 1947, the Board and Courts have uniformly applied the so-called "right of control" test to determine whether or not certain individuals are employees of a particular employer. Under this test, an "employer" is one which controls the fundamental elements of the employment relationship.



In the case at bar, the Board found that Floors hires, pays, disciplines, transfers, promotes, and discharges the employees here involved. Yet it held Greyhound to be the joint employer of the employees. In so holding, the Board clearly acted in excess of its statutory authority. The Board's decision forces Greyhound to bargain concerning employees over whom it exercises no real control and with whom it has no real concern; the decision deprives Floors of the right to control its labor relations free from Greyhound interference; the decision completely vitiates an undisputedly valid independent contractor relationship. The District Court was eminently correct in enjoining the illegal election ordered by the Board.

### III. ARGUMENT

The argument of Floors in support of its position in the case at bar is set forth below. Each of the factors discussed herein points to the inevitable conclusion that the Board acted arbitrarily and wholly in excess of its powers in finding Greyhound and Floors to be co-employers in this case.

#### A. The Reason Why Amalgamated Named Greyhound As Co-Employer

The original petition for recognition filed by Amalgamated named Floors as the sole employer of its employees working in the Jacksonville, Miami, Tampa, and St. Petersburg Greyhound terminals (TR. 65). This petition was filed on April 17, 1961. At this time, Floors employed a total of 384 employees in Florida, of whom only 63 worked part or full time in Greyhound terminals (TR. 42). For example, in Tampa, only 12 of 26 Floors employees worked in the Tampa Greyhound terminal (TR. 42). The remain-

ing Floors employees worked at the place of business of other Floors customers.

Thus the unit originally sought by Amalgamated consisted of less than all Floors employees in Florida, less than all Floors employees in a given city, and attempted to group together some employees in different cities who had no distinct community of interests. Such a unit could not possibly be deemed appropriate under the Act, since its only conceivable basis would be the extent of union organization. Such a basis is prohibited by Section 9(c) (5) of the National Labor Relations Act, as amended (hereinafter referred to as the "Act").

Apparently realizing the illegality and impracticality of its proposed unit, Amalgamated came up with an amendment to its petition naming Greyhound as a co-employer of the Floors employees at the Greyhound terminals (TR. 66). It is clear that Amalgamated was grasping at straws in an attempt to segregate these 63 employees from the remaining 321 Floors employees in Florida.

This reason for Amalgamated's naming of Greyhound as co-employer, by amendment, is extremely relevant to the case at bar. It demonstrates that even Amalgamated did not in truth consider Greyhound as an employer of Floors' employees. The union's motive for naming Greyhound certainly had nothing to do with advancing the statutory rights of employees. Instead, its motive was to evade the statutory directive as to appropriate units for bargaining.

#### **B. The Decision of the Board**

While the same evidence was before the Board as was presented to the District Court, the Board failed to elaborate upon or discuss any of the crucial factors which

negate the possibility of Greyhound being a co-employer of the Floors employees. The Board did specifically find, however, that "... Floors hires, pays, disciplines, transfers, promotes and discharges..." the employees at the Greyhound terminals (TR. 10).

In spite of the above fundamental indicia of employment relationship, the Board proceeded to hold Greyhound to be the joint employer of the employees sought. The Board's conclusion as to "common control" was based solely on the following factors: Greyhound's terminal managers confer with Floors' supervisors in setting up work schedules and in determining the number of employees required to meet the schedules; Floors' supervisors may visit the Greyhound terminals on an irregular basis and "on occasion" may not appear for as much as two days at a time; the employees in the unit sought sometimes receive work instruction from Greyhound terminal officials; and on one occasion Greyhound "prompted" the discharge of a porter (TR. 10). Board Member Philip Ray Rodgers dissented from the Board's decision. Mr. Rodgers would have held Floors to be a sole employer and the appropriate unit to consist of all Floors employees in the localities involved.

### C. The Decision of the Court Below

The Fifth Circuit Court of Appeals affirmed the decision of the District Court in a *per curiam* opinion in which the Court expressed its agreement with the principles stated in the District Court's Opinion and the decision there reached. An examination of the District Court's Opinion, by Judge Lieb, demonstrates the soundness of his decision.

Judge Lieb first stated the factors of control which were found to belong to Floors—hiring, paying, disciplin-

ing, transferring, promoting, and discharging the employees (TR. 52). The Court then recited the factors relied on by the Board in finding a joint employer relationship (TR. 53). Based on the above facts, Judge Lieb stated:

"The Court is of the opinion that the findings of the Board, as recited, are, as a matter of law, insufficient to create a joint employer relationship with respect to the employees in said unit; but that, on the contrary, said findings establish as a matter of law that Floors, Inc., is an independent contractor and, for the purposes of collective bargaining, its employees are not the employees of the plaintiff." (TR. 53).

The District Court was fully aware of the limitations of its powers in cases of this nature. Judge Lieb stated the test of his authority as follows:

"Whether or not this Court is authorized to intervene in a representation proceeding depends ultimately on the facts presented to it; and if it appears that the Board exceeded its delegated powers, either by acting contrary to a mandatory prohibition of the Act (see *Leedom v. Kyne*, *supra*) or by acting clearly contrary to the over-all spirit of the Act and the manifested intention of Congress (see *Empresa Hondurena de Vapores v. McLeod*, *supra*), then this Court cannot fail to exercise its equity powers to prevent a wrong." (TR. 55).

Based on the facts as found by the Board, the District Court concluded that "... the Board has attempted to act in excess of its delegated power, particularly in view of the legislative history of the portion of the Taft-Hartley Act of 1947, which amended the definition of the word 'employee' so as to expressly exclude 'independent contractors.'"

It is clear that the District Court's decision enjoining the election was based on the holding that the Board's de-



cision on its face showed that the Board had acted in excess of its statutory authority. The basic facts found by the Board were elaborated upon in affidavits presented to the District Court. These additional facts are mentioned in the Court's Opinion (TR. 54) and certainly serve to strengthen its decision. However, the Court's decision is based on the facts as found by the Board. The Court concluded that as a matter of law those facts were insufficient to create a joint employer relationship.

#### **D. The Test of Employer-Employee Relationship**

In the briefs of Petitioner and of Amalgamated, it is contended that the Board acted reasonably in finding Greyhound and Floors to be co-employers. Yet nowhere in those briefs is there set forth any statutory authority for such decision. The apparent contention of Petitioner and Amalgamated is that the Board is entitled under Section 9 of the Act to make a conclusive determination as to the employer-employee relationship, and that such determination cannot be upset by the judiciary regardless of its arbitrariness or the fact that no statutory authority exists for such determination. This contention was rejected by the District Court and the Court of Appeals for the obvious reason that no administrative agency is empowered to completely ignore the statutory source of its authority in making a decision. This is precisely what the Board did in the instant case.

Section 2(3) of the Act provides in pertinent part: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, . . . but shall not include . . . any individual having the status of an independent contractor . . ."

Section 8(a) (5) of the Act, relating to the duty to bargain collectively, provides as follows:

"It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." (Emphasis added.)

Section 8(a) (5) of the Act establishes a duty to bargain on the part of an employer with the representatives of his employees. A refusal to bargain must be directed against one's own employees for there to be a violation of the Act. *Operating Engineers v. N.L.R.B.*, 266 F.2d 905 (C.A. D.C., 1959), cert. den. 361 U.S. 834.

The question before the Board in the case at bar was as follows: who had the primary right of control over matters fundamental to the employment relationship? The Labor Management Relations Act, 1947, as amended, as is demonstrated by judicial interpretation and legislative history, limits the Board to this determination. Of the many factors of control which make up the "primary right of control," the ones most frequently given effect by the Board and courts are the following: right to hire, discharge and discipline; right to pay and control wages; right to fix fringe benefits; day-to-day supervision; payment of workmen's compensation insurance, federal and state unemployment insurance and social security; ownership of premises upon which work is performed; ownership of equipment used by employees; and right to control hours of work. The facts of the case at bar add one other control factor which is of highest importance—the right to rotate employees from one customer to another.

Prior to the 1947 Taft-Hartley amendment to the Act, the Board had grossly expanded the definition of "employee" to the point where even an independent contractor was considered an "employee" under the Act. The legislative history of the 1947 amendment demonstrates the

express disapproval by Congress of the Board's broad interpretation of this term.

"But in the case of *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (1944), the Board expanded the definition of the term 'employee' beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the Act, not new meanings that, 9 years later, the Labor Board might think up." H. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947).

Since the passage of the Taft-Hartley amendment, the Board and courts have given effect to the legislative intent there expressed and have rejected the *Hearst Publications* approach.

In determining the issue of employer-employee relationship, the Board and the courts have uniformly applied the so-called "right of control" test. This is not, of course, the strict common law control test. It is a test which has been worked out by the Board and approved by the courts as a just formula for furthering the purpose of the Act. The "right of control" test was clearly stated by the Board in the case of *Duane's Miami Corp.*, 119 N.L.R.B., 1331 (1958), as follows:

"... the question as to whether the lessor or the lessee is the employer of the leased department employees in this type of case is determined by which of the two has the primary right of control over matters fundamental to the employment relationship."

This Court recognized the correctness of the "right of control" test in the case of *N.L.R.B. v. Denver Building*

and *Construction Trades Council*, 341 U.S. 675 (1951). It was there stated by Justice Burton:

"We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so. The Board found that the relationship between Doose & Linter and Gould & Prusner, was one of 'doing business' and we find no adequate reason for upsetting that conclusion."

The decision of the Court below in holding as a matter of law that Greyhound is not the employer of the Floors employees is completely in accord with decisions of other circuit courts on the question of employer-employee relationship. Those courts have uniformly applied the "right of control" test to such situations and have arrived at the same conclusion as was reached by the Court below in the case at bar.

In the case of *N.L.R.B. v. Norma Mining Corp. et al.*, 206 F.2d 38 (C.A. 4, 1953), the Board had found two separate corporate entities to be joint employers of certain employees of one of the companies. Because of factors very similar to those present in the case at bar, the Fourth Circuit Court found that the relationship between the two companies was consistent with a *bona fide* independent contractor relationship. The Court rejected the Board's findings as to the joint employer status.

In the case of *N.L.R.B. v. Carroll*, 120 F.2d 457 (C.A. 1, 1941), the Respondent engaged in interstate transportation of mail by truck pursuant to a contract with the United



States embodying no restrictions on the freedom of the Respondent to employ whomsoever he chose, other than general limitations and provisions that the postmaster might require the suspension of a driver from duty for inefficiency or other serious delinquency. The First Circuit Court held that Carroll was an independent contractor and the truck drivers hired by him were his employees and not the employees of the United States. At page 458, the Court cites numerous decisions in support of its conclusion.

The Eighth Circuit Court has also arrived at the same conclusion under similar situations. In the case of *N.L.R.B. v. New Madrid Manufacturing Company et al.*, 215 F.2d 908 (C.A. 8, 1954), the Court discussed the requirements necessary to the creation of a co-employer relationship:

"The sole transaction therefore first must be approached in relation to such legal realities as its terms and provisions ostensibly have created. And, unless those terms and provisions, either expressly, or as a matter of reasonable implication, can be said to have given New Madrid a right or power of control over Jones' prerogative of management in general, or over his labor relations in particular, there is no basis on the contract itself to brand Jones and New Madrid as having created the status of co-employership in respect to the Portageville plant." (Emphasis added).

The above cases have each held, in effect, that the Board cannot arbitrarily find a joint employer status without statutory authorization for such finding. The courts have uniformly sustained a finding of co-employership only where the "right of control" test, correctly applied, has shown it to exist. Where the right of control is not in both parties, the Board's finding of joint employer status has been rejected. This is the situation in the case at bar.

The "right of control" test was recently applied by the Eighth Circuit Court of Appeals in the case of *Site Oil Company of Missouri v. N.L.R.B.*, \_\_\_\_\_ F.2d \_\_\_\_\_, 53 LRRM 2604 (C.A. 8, 1963). In the *Site Oil Company* case, *supra*, the owner of a service station was accused by the Board of refusing to bargain with employees of an independent contractor to whom the owner had leased the service station operations. The Eighth Circuit refused enforcement of the Board's decision. The Court, by Judge Sanborn, stated:

"The legislative history of the Labor Management Relations Act clearly shows that Congress was utterly opposed to having the National Labor Relations Board convert those who had always been understood to be independent contractors into employees."

The Court further concluded:

"There are many businesses in which management may make a choice as to the manner in which the business shall be conducted, and that choice will be respected. . . . This, in our opinion, is true of the business in which Site is engaged. It may operate one of its filling stations itself by its own employees or it may lease the station to an independent contractor to operate."

The Third Circuit Court of Appeals has also very recently recognized the validity of the "right of control" test for establishing the employment relationship. *N.L.R.B. v. Howard Johnson Co.*, 317 F.2d 1 (C.A. 3, 1963).

The arbitrary unreasonableness of the Board's decision in the case at bar is perhaps best illustrated by comparing this decision with the Board's decision in the recent case of *Charlotte Union Bus Station*, 135 N.L.R.B. No. 23 (1962), which was decided very shortly before the Board's decision in the instant case. The *Charlotte Union* case involved a

janitorial service company which was under contract to perform its services for a bus station, a situation identical to the case at bar. In its decision, the Board held that the bus station and the service company were not joint employers. The control factors upon which its decision was based were identical to those in the instant case. Yet, the Board applied the right of control test and arrived at a directly opposite decision from the instant case.

#### **E. The Control Test Applied to the Case at Bar**

The Board's decision in the case at bar shows on its face that Floors possesses the sole right to control the essential elements of the employment relationship between it and the employees here involved. In order to gain a complete understanding of the reason for this control, it is necessary that this Court understand the nature of Floors' business.

##### **(1) The Business of Floors**

In the briefs of Petitioner and Amalgamated, the nature of the business of Floors is completely ignored. The argument of Amalgamated appears calculated to have this Court erroneously believe that Floors is a company formed for the sole purpose of permitting Greyhound to enter into a sham contract by which Greyhound could evade the responsibility for the labor relations of janitorial and service employees. This argument is grossly misleading and fails to do justice to the facts of this case.

Floors, Inc., of Florida is a Florida corporation and a wholly owned subsidiary of Floors, Inc., a Georgia corporation headquartered in Atlanta, Georgia. Floors is engaged in the business of furnishing cleanup, building maintenance and other allied services. It furnishes these services to varied customers throughout Florida, one of which is Grey-

hound. Floors employs a total of 384 persons in the State of Florida. Of these 384 employees, only 63 work part or full-time in Greyhound Terminals. Floors contracts to perform services for its customers for a predetermined price. Floors agrees to provide its customers with a certain number of man-hours of work per week to perform the work contracted for by the customer. All Floors employees are under the immediate supervision of some one of many Floors' supervisors in Florida.

Greyhound has absolutely no ownership interest in Floors. Nor is there any common control of management of labor policy. This is obviously the case, since only 16% of Floors' employees in Florida were, at the time of the Board hearing, working under Floors' contracts with Greyhound.

## (2) The Control of Floors over Its Employees

The business of Floors is discussed above. By virtue of the nature of its business, Floors possesses one factor of control over its employees which, we submit, dictates the conclusion that Floors is the sole employer of its employees working at Greyhound terminals. This control factor is the right to "rotate" Floors employees from one customer to another. Simply stated, this is the right, when more man-hours are needed at one customer's place of business, to take an employee who is working on another job and place him on the job which requires more man-hours. It can readily be seen that this is not only a "right" which Floors possesses; it is essential to the carrying out of its business purpose. The crux of Floors' existence is the ability to provide a specialized service to its customers when and as needed. To adequately perform this specialized service, Floors must retain the right to at any given time transfer an employee from one job to another job.



where he is more needed. The Board's decision in the instant case effectively destroys this essential element of the business of Floors.

Of course, Floors does not exercise its "right of rotation" indiscriminately, since the longer any employee works on a particular job, the more skilled and efficient he becomes at performing that job. For this reason, employees are rotated only when necessary. But the necessity does arise, and when it does Floors must be able to act to meet the occasion. The record before the Board contained two instances in which Floors had used employees working at Tampa Greyhound on another job. Since Tampa is a very small part of Floors' operations, it is a reasonable assumption that the rate of rotation in other cities, such as Miami and Jacksonville, would be greater than that in Tampa. In fact, the Board record contains instances of transfer from one job to another in Miami and Jacksonville.

Although the record of the Board hearing was not before the Court below, and is not officially before this Court, the *amicus curiae* brief of Amalgamated contains many citations to that record. Nowhere in Amalgamated's brief, however, is there mention of the right of "rotation" or transfer discussed above, in spite of the obvious fact that this is one of the most important indicia of employer status in the case at bar, and in spite of the fact that the Board found specifically that Floors does transfer the employees (TR. 10).

The above discussion of the right of transfer from one customer to another leads into a consideration of another important aspect of the case at bar. The Board found, quite properly, that Floors hires, disciplines, promotes, transfers, and discharges the employees at the Greyhound Terminal (TR. 10). This points up the fact that customers of Floors, such as Greyhound, do not concern themselves

with the particular employees working on the job, but only with the performance of the contract by Floors. That is to say, Floors could have different ones of its employees working on the Greyhound job every day. Greyhound could not care less which Floors employees were on the job as long as the work which Floors was supposed to perform was performed. Greyhound has no interest whatsoever in the individual Floors employee.

The record of the Board hearing was clear, and the Board found in accordance therewith, that Floors hires and discharges its employees. Yet the Board placed undue emphasis on one occasion on which Greyhound requested that a Floors employee be removed from the Greyhound job. Floors complied with the request. But even on that one isolated occasion, Greyhound did not effect a discharge of the employee. Only Floors has the ultimate decision to make as to whether to discharge the employee or to transfer him to another Floors job. Greyhound would have nothing to do with this decision.

Only the essential control factors were mentioned by the Board in its Decision and Order. Many others are present in the case at bar. Floors submits that the Board's decision shows on its face that the Board acted in excess of its authority in finding an employer-employee relationship between Greyhound and the Floors employees. However, since Amalgamated has chosen in its brief to refer to various portions of the record of the Board hearing, Floors will also refer to that record in order to point out the control factors which completely negate the conclusion reached by the Board.<sup>2</sup>

In line with Floors' right and duty to hire, discipline, and discharge its own employees is the fact that Floors

2. References to the transcript of testimony before the Board are designated as "(RB. . .)".

also trains the employees for the particular job to which they are assigned. At the Board hearing, the Floors supervisor in Tampa testified (RB. 173) as to the procedure for training new Floors employees. If the new man is put on a day shift, the supervisor himself gives the training instructions. If the new employee is put on a night shift, the supervisor instructs an older porter to train the new man. Greyhound has absolutely nothing to do with the training of new employees (RB. 173).

As the Board correctly found, the wages of these employees are paid by Floors. There is abundant testimony in the Board record that the pay checks are mailed from Floors' main office in Atlanta to Floors' supervisor in each city (RB. 159, 247). In Tampa, the checks are handed by the supervisor to the employees (RB. 159, 212). He mails the St. Petersburg employees' pay checks to St. Petersburg for the employees' convenience (RB. 159). In Miami the checks are either distributed to Floors' employees by the Floors supervisor there, or left by him for employees to pick up (RB. 228-229). Floors also handles the withholding of income taxes of its employees (RB. 186).

With respect to who actually controls the amount of the wages paid these employees, the contract between Floors and Greyhound, as stated above, is determined on a man-hour basis. Therefore, Greyhound quite naturally has some concern over the wages paid the Floors employees. Such concern is essential in order to have some control over the cost factor in the cost-plus contract, which is merely sound business practice. Accordingly, there is testimony in the record to the effect that Floors could not increase the labor cost of the contract by 25 percent without the approval of Greyhound (RB. 253). In spite of this basic economic fact, Floors still makes the initial determination as to the pay which an employee shall receive. Strong evi-

dence of this is found in the fact that all janitors and maids employed by Floors in the Tampa area, working on the premises of various Floors customers, receive the same wage rate (RB. 172, 204). This would certainly not be true if the wage rate were determined by each customer. Further evidence of Floors' control over wages is found in the matter of overtime pay. The agreement between Floors and Greyhound provides that Greyhound will not be charged for overtime wages unless approved by Greyhound (RB. 54). However, Floors can work employees any time it desires with or without approval of Greyhound. The lack of Greyhound approval would only mean that Floors would have to absorb the cost of the overtime payments (RB. 54). This control over overtime wages is not an abstract right possessed by Floors; it has actually been exercised, and Floors has in fact absorbed the overtime costs (RB. 175). From this fact, it can be seen that Greyhound controls only the amount it pays to Floors; it does not control the amount Floors pays to Floors' employees. The statement to the contrary contained in Amalgamated's brief (p. 16) is erroneous.

Floors also sets the fringe benefits of its employees. The employees of Floors throughout the Tampa area receive the same benefits and working conditions (RB. 206). It is evident from the Board record that as long as Floors provides Greyhound with the number of man-hours contracted for, Greyhound is totally unconcerned with the matter of vacations, holidays, etc. Moreover, Floors pays workmen's compensation insurance, social security, and unemployment compensation on its employees (RB. 186). The payments of these benefits are certainly acts of an employer in relation to its own employees.

The question of supervision is naturally of great importance in determining who is the employer of certain



employees. In this connection, it was stipulated at the Board hearing (RB. 281) that the testimony of the Greyhound terminal managers at Jacksonville and St. Petersburg would be substantially the same on the question of control as the testimony in the record of the terminal managers at Tampa and Miami. The only Floors supervisor who could be present at the Board hearing was the supervisor of Floors' employees in Tampa and St. Petersburg. Since the contract between Floors and Greyhound is similar in all four cities, in respect to supervision provisions, it can be presumed that the supervision situation in each city is substantially the same.

In an attempt to show a lack of control by Floors supervisors at the Board hearing, Amalgamated called as a witness one William Warren, Floors' employee at the Tampa Greyhound terminal. On direct examination, Warren could name only two instances since Greyhound and Floors entered their contract that the Greyhound Terminal Manager has requested that he perform a certain job (RB. 210, 211). On cross-examination, Warren stated that he not only looked to the Floors supervisor for instructions but considered that person to be his boss (RB. 213). On further cross-examination, Warren testified that he would ask the Floors supervisor, and not the Greyhound Terminal Manager, for permission to get off work, and that in fact he went to the Floors supervisor to request permission to attend the Board hearing (RB. 213, 214). Warren also testified that after Floors and Greyhound made their contract, he applied to the Floors supervisor for a job (RB. 214, 215). Warren testified on re-direct examination that Mr. Rhoden, Greyhound Manager, had once asked a Floors employee to work overtime on a job left vacant by the absence of another Floors employee (RB. 216), but on re-cross-examination, Warren further stated that Mr. Rhoden

had called the Floors supervisor at St. Petersburg before taking that action (RB. 216, 217). The evidence presented by William Warren supports the position of Floors that it is the employer of these employees.

Floors, by its contract with Greyhound (TR. 16-34), agreed to furnish supervision over its employees working at the Greyhound terminals. This contractual provision has been complied with by Floors. Amalgamated and Petitioner contend that the actual supervising of these employees is performed by Greyhound. The overwhelming weight of the evidence in the Board record, and particularly the testimony of the Tampa Floors supervisor, positively refutes that contention. Floors agreed by a contract to do a job for Greyhound. The two parties initially determined what type of work had to be done, and this necessarily included instructions to Floors as to what was expected of Floors' employees. But this is as far as Greyhound's instructions went. Greyhound representatives do not supervise or instruct Floors' employees on the job, except in the rare case where an emergency necessitates such instruction (RB. 89). The testimony of all Greyhound officials who testified before the Board (RB. 34, 35; 104, 105; 278) is to the effect that their contact with Floors employees is carried on through the Floors supervisor, and that it is the supervisor who gives orders to the porters, janitors and maids. The above testimony was directly supported by the introduction into evidence of a memorandum from the Greyhound Superintendent in Tampa to Greyhound supervisors in the Tampa area (RB. 48-50) stating that Greyhound supervisors were to give no instructions to Floors' employees, but were to go to the Floors supervisor concerning any complaints about Floors' employees' work. This memorandum was dated September 29, 1958, which illustrates the fact that the situation

as to supervisory control existing at the time of the hearing had been in existence for at least three years.

The Tampa Floors supervisor testified to the following facts relating to the question of day-to-day supervision. The only instructions which the Tampa supervisor receives are from his Floors superiors, namely, the home office in Atlanta or from C. L. Stewart, who is in charge of the Floors operation in Florida (RB. 153). The Tampa Greyhound terminal manager does ask the Floors supervisor to do certain things (RB. 148). If the Floors man decides that the request is proper and within the contract between Floors and Greyhound, he then instructs the Floors employees to perform the requested work (RB. 150). In other words, the Floors supervisor, in carrying out the request of the Greyhound terminal manager, is simply performing Floors' part of the Greyhound contract. If the requested work is not covered by the contract, he can refuse to do it. Any unresolved question would be determined by Floors and Greyhound management. The regular Floors supervisor testified that when he goes on vacation, another Floors supervisor replaces him during that period (RB. 189). It is clear that Floors carries out the provision in its contract with Greyhound by which Floors agrees to supervise Floors employees on the Greyhound premises. For this reason, the Floors supervisor instructs his employees to comply with requests made by Greyhound personnel in his absence, and to then complain to him (RB. 184). This does not mean that Greyhound personnel can supervise Floors employees. It simply means that, to avoid friction, the Floors supervisor would rather take the employees' grievances to Greyhound for complaint himself (RB. 184, 185). It is important to note that it is only because their Floors supervisor ordered them to do so that the Floors employees occasionally take instructions from Greyhound.

Day-to-day supervision is an important part of the employer-employee relationship. The record in this case fails completely to show any such control or supervision exercised by Greyhound over the Floors employees. The only conclusion which can be reached from the record is that the Greyhound control asserted by Amalgamated does not exist. At most, the Board record shows that Greyhound employees can give Floors' employees occasional routine instructions as to certain details of their work. The direct day-to-day supervision over matters which are important to the employment relationship is performed by the Floors supervisor.

Another control factor which is pertinent to this case is where and with what materials these employees work. Of course, they work on the premises of Greyhound, since the nature of Floors' business requires its employees to work at the place of business of Floors' customers. However, although these employees are working on Greyhound property, the supplies and equipment (brooms, mops, wax, etc.) which they use on the job are owned by Floors and furnished the employees by Floors (RB. 186, 247).

The question of who controls the employees' hours of work is relevant to this case. It is important to remember here that Floors has contracted to do a job for Greyhound. At the Greyhound terminals in Miami, Tampa, Jacksonville and St. Petersburg, Floors performs the portering and janitorial work. It is clear in the Board record that as long as this work is done properly, Greyhound does not concern itself with which Floors employees work, when, or how many hours. In the words of the Greyhound terminal manager, "... just as long as everything is handled properly we don't care." (RB: 53). Greyhound's only concern is that the bus schedules be covered (RB. 53). Grey-



hound posts the bus schedules in the terminal, and it is left to the Floors supervisor to see that the schedule is covered by Floors porters (RB. 161). The work hours of Floors' employees are not set up to coincide in any way with the hours of Greyhound employees (RB. 167, 168). Neither does the Floors employees' lunch break have any relation to that of the Greyhound employees (RB. 171). The Board record shows clearly that Greyhound has nothing to do with the hours worked by any particular Floors employee.

In its Decision and Order, the Board found that "... Floors hires, pays, disciplines, transfers, promotes and discharges the porters, janitors and maids." In addition to the above control factors pointed out by the Board, the record of the Board hearing clearly shows that Floors trains all new employees; determines wage rates and pays its employees; handles withholding taxes on its employees; controls fringe benefits and pays workmen's compensation, unemployment insurance and social security on its employees; provides supervision over the day-to-day activities of its employees; owns and furnishes all supplies and equipment used by the employees; and, finally and of crucial importance, Floors retains and exercises the right to use its employees on whatever job it desires at any time.

There is clearly no authority in the statute for the Board to decide that the employees of Floors are also employees of Greyhound. Greyhound is simply not an employer, in any sense, of the Floors employees. It is extremely difficult to see how at this late date the Board can attempt to reinstate the *Hearst Publications* interpretation of "employee" directly in the face of Congressional criticism and legislative reversal of the *Hearst* interpretation. The Court below was eminently correct in enjoining the Board from acting in excess of its statutory authority.

## **F. The Effect of the Board's Decision**

A consideration of the effect which the decision of the Board, if allowed to stand, would have on the business of Floors is relevant to this Court's decision in the case at bar. It also serves to demonstrate the unreasonableness of the Board's decision and the lack of statutory approval for such decision.

The agreements between Floors and Greyhound covering the various Florida Greyhound terminals are in the record before this Court. There can be no doubt that the agreements create a legitimate independent contractor relationship. The sole purpose of Floors' corporate existence is to provide janitorial and other services of a like nature to its customers. Greyhound is only one of many customers serviced by Floors.

The growth of companies similar to Floors has been phenomenal in the past decade. They serve a highly beneficial purpose to the American economy, as is illustrated by the Floors-Greyhound situation. Greyhound is primarily in the business of bus transportation. The selling of bus tickets, the maintenance of its buses, and the driving of its buses to destination are the primary concerns of Greyhound. The janitorial and portering services at Greyhound terminals, while necessary, are not directly a part of Greyhound's business objective. For that reason, Greyhound contracts out its janitorial and portering work to an independent contractor who can provide specialized and efficient service in that area. This relieves Greyhound of the expense and burden of managing and controlling the janitorial and portering services at its terminals.

At the same time, the expense and burden of such services are completely assumed by the independent con-

tractor. The expense is less because of the degree of specialization with which the contractor performs the services. The burden is less because the contractor can concentrate on those particular services. It does not have to worry about the operation of a large bus transportation company. The legitimate benefit afforded by companies such as Floors is obvious.

What is the effect of the Board's decision in the case at bar on the situation described above? Greyhound is held to be a joint employer of Floors' employees. It is no longer relieved of the burden of managing the janitorial services at its terminals. In fact, the burden is multiplied. Now, it cannot even act with respect to those services as it wishes, since it must act jointly with another, wholly independent company. By the same token, Floors, which has hired, fired, disciplined, paid, transferred and controlled its employees at the Greyhound terminal, now finds that it is no longer their employer. Floors no longer has control over their employment relationship, since it must consult Greyhound whenever it desires to act on a matter of labor relations. The valid independent contractor arrangement is vitiated without cause by administrative fiat.

The arbitrary creation by the Board of a joint employer status will inevitably cause companies such as Floors to be eliminated. Their beneficial purpose will simply have been destroyed. Moreover, the Board's decision does not purport to favor the interests of the particular employees involved in this case. No persuasive reason has been, or could be, given for the baseless finding that Greyhound and Floors are co-employers of the Floors employees.

#### IV. CONCLUSION

It is respectfully submitted that the Board's decision in the case at bar went far beyond the statutory authority of the Board to make determinations as to the appropriateness of a unit of employees. The District Court had jurisdiction, and indeed an obligation, to enjoin the election illegally ordered by the Board.

Accordingly, the decision of the Court of Appeals for the Fifth Circuit affirming the District Court should be affirmed.

Respectfully submitted,

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**Supreme Court of the United States**

**October Term, 1962.**

**No. 77.**

**HAROLD A. MOIRE, REGIONAL DIRECTOR, TWELFTH  
REGION, NATIONAL LABOR RELATIONS BOARD,**  
*Petitioner,*

**v.**

**THE GREYHOUND CORPORATION,**  
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals  
for the Fifth Circuit.**

**BRIEF FOR THE GREYHOUND CORPORATION,  
RESPONDENT.**

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IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1963.

No. 77.

HAROLD A. BOIRE, REGIONAL DIRECTOR,  
TWELFTH REGION, NATIONAL LABOR RE-  
LATIONS BOARD,

*Petitioner,*

v.  
THE GREYHOUND CORPORATION,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT.

**BRIEF FOR THE GREYHOUND CORPORATION,  
RESPONDENT.**

The brief for the Regional Director of the National Labor Relations Board ("the Board") correctly states the Opinions Below and Jurisdiction.

**STATUTES INVOLVED.**

In addition to the provisions of the National Labor Relations Act, as amended, set forth in the Appendix to the Board's brief, the respondent ("Greyhound") sets forth in the Appendix hereto, *infra*, p. 41, Sections 10(j) and 10(l) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 460(j) and 160(l)) and the relevant provision of the Judicial Code (62 Stat. 931, 28 U. S. C. 1337).



**QUESTION PRESENTED.**

Where a decision of the National Labor Relations Board shows on its face findings which, as a matter of law, establish absence of jurisdiction over a party, does a district court have jurisdiction to enjoin further proceedings with respect to such party?

**STATEMENT OF THE CASE.**

The Greyhound Corporation ("Greyhound", plaintiff in the District Court, appellee in the Court of Appeals, and respondent herein), is a Delaware corporation engaged in interstate motor carriage (R. 1)<sup>1</sup> and operating terminal facilities at numerous locations, including Jacksonville, Miami, Tampa and St. Petersburg, Florida (R. 45). Floors, Inc., of Florida ("Floors"), is a Florida corporation and a wholly owned subsidiary of Floors, Inc., of Georgia. Floors is engaged in the business of furnishing clean-up, building maintenance, and other allied services to varied customers throughout Florida, including the four Greyhound terminals referred to above (R. 42). Of at least 384 persons employed by Floors in Florida at the time the petition for representation was filed, a total of only 63 work part or full time at Greyhound Terminals in Florida (R. 42).

Floors furnishes its services on a fixed price or cost-plus basis to all customers (R. 43). Greyhound and Floors have no common identity, are not a single or joint entity, have no common directors, stockholders, or officials, and there is no mutuality of operating control (R. 9, 47).

On April 17, 1961, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO ("Union"), filed a petition with the National Labor Relations Board ("Board"), seeking to be certified

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1. R., as used herein, refers to the printed Transcript of Record.

as the representative for collective bargaining for "all porters and maids located in the Greyhound Corp. bus terminals at Miami, St. Petersburg, Tampa and Jacksonville, Florida." Said petition gave the name of the employer as "Floors, Inc." (R. 65). On May 25, 1961, the Union filed an amended petition, seeking to represent the same unit described in the original petition, and gave the name of the employers as "Southeastern Greyhound Lines, and Floors, Inc." (R. 66).

Upon the hearing on the petitions, Greyhound vigorously asserted and adduced evidence in support of its contention that it was not the employer of the persons comprising the proposed unit (R. 5).

By Decision and Direction of Election dated May 3, 1962 (R. 9-11), the Board directed the Regional Director ("Board", defendant in the District Court, appellant in the Court of Appeals, and petitioner herein) to conduct an election no later than 30 days from May 3, 1962 among:

"All porters, janitors and maids working at the Greyhound Corporation's bus terminals in Miami, St. Petersburg, Tampa and Jacksonville, Florida, excluding all other employees of the Greyhound Corporation and Floors, Inc. of Florida." (R. 9-10)

The Board's decision found both Greyhound and Floors to be the "joint employer" of the persons in the above described unit (R. 9-10). In support of this finding the Board found:

"It appears that Floors hires, pays, disciplines, transfers, promotes and discharges the porters, janitors and maids. However, it also appears that Greyhound's terminal managers confer with Floors' supervisors in setting up work schedules and in determining the number of employees required to meet those schedules. Moreover, it also appears that Floors' supervisors may visit the Greyhound terminals on an irregular

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basis and on occasion may not appear for as much as two days at a time; and that the employees sought, including porters in handling baggage, receive work instructions from Greyhound terminal officials. In addition, the record also shows that Greyhound, on one occasion, prompted the discharge of a porter whom it felt to be an unsatisfactory employee. In view of the common control over the employees sought, we find both Greyhound and Floors to be their joint employer." (R. 10)

There is no finding that Greyhound has any right, control, or authority to bargain collectively with the persons in the unit "in respect to rates of pay, wages, hours of employment, or other conditions of employment." (Section 9(a) of the Act, P. A. 34.)

Member Rodgers dissented, stating:

"On the basis of the record herein, I would find that the employees sought are employees of Floors, that Floors is an independent contractor, and that the only appropriate unit is one comprised of all of Floors' employees in the above-described localities. Accordingly, I would dismiss the petition." (R. 10)

Following the Board's Decision and Direction of Election, the Board proceeded to arrange for the election on either May 28 or May 29, 1962, but no later than June 1, 1962 (R. 12-15). Whereupon, Greyhound filed the complaint in the instant case, and exhibits thereto (R. 1-41), seeking an injunction against the effectuation of the Board's Decision and Direction of Election, the said Decision and Direction of Election being in excess of the Board's delegated powers, contrary to the provisions of the Act, and violative of Greyhound's rights under the Act.

In support of the complaint, Greyhound filed two affidavits, neither of which was controverted by counter-

2. P. A., as used herein, refers to the Appendix to petitioner's brief.

affidavit or otherwise. One affidavit is that of an officer of Floors (R. 42-44); the other by the regional manager of Greyhound (R. 45-47), the latter, *inter alia*, swearing to the allegations of the complaint (R. 47). These affidavits not only show that Floors "hires, pays, disciplines, transfers, promotes and discharges the porters, janitors and maids", but also show that Floors withholds income taxes, pays workmen's compensation, unemployment compensation and social security on these employees; owns and furnishes all supplies and equipment used by its employees; determines hours of work, assigns, supervises, and determines all labor policy with regard to these employees (R. 43-44, 46-47). Many other factors demonstrating Floors to be the sole employer of the employees are set forth in the affidavits.

The contracts between Greyhound and Floors (R. 19-34) also show the independent contractor relationship, as does an order of Honorable Bryan Simpson, United States District Judge for the then Southern District of Florida, entered July 27, 1955 (R. 35-41), in an action between Greyhound and the Union regarding the effect of the contract between Greyhound and Floors.

The District Court issued a temporary restraining order on May 24, 1962 (R. 48-50), and an order extending the same for ten days (R. 51).

The Board filed a motion to dismiss, or, in the alternative, for summary judgment (R. 63-64), on the grounds that the District Court is without jurisdiction of the subject matter; that the District Court lacks jurisdiction of the members of the Board, who are indispensable parties; that the action is premature; and that the complaint fails to state a claim warranting relief.

The cause came on for hearing and, there being no issues of fact, the Board's motions were denied and a permanent injunction issued. The District Court made extensive findings of fact and conclusions of law, including, *inter alia*, that the employees involved are solely the em-



employees of Floors and not of Greyhound; that, with regard to representation proceedings, the Board is prohibited by the provisions of the Act from conducting an election wherein Greyhound is a party-employer with regard to persons who, under the Act, are not its employees; that Section 9 of the Act expressly contemplates representation proceedings only as regards the employer of the employees comprising the unit found to be appropriate by the Board. The District Court made findings of fact and conclusions of law supporting the denial of each contention of the Board (R. 53-59, 205 F. Supp. 686, et seq.).

From the Final Decree for Permanent Injunction and Memorandum Opinion, filed June 12, 1962, the Board appealed (R. 60-62).

Upon appeal, the United States Court of Appeals for the Fifth Circuit filed a per curiam opinion, entered November 21, 1962, affirming the District Court (R. 71, 309 F. 2d 397) and entered its judgment thereon on December 19, 1962 (R. 72).

This Court granted the Board's petition for writ of certiorari (R. 73).

### **SUMMARY OF ARGUMENT.**

The power of the Board is circumscribed by the authority granted by Congress. The Congress has deprived the Board of authority to determine that one is an employer where another hires, pays, disciplines, transfers, promotes and discharges the employees in the unit deemed appropriate for collective bargaining. This limitation is contained in the legislative history of the 1947 amendment to Section 2(3) of the Act, which excludes "independent contractors" from the term "employee". The legislative history shows the Congress intended that the historical common-law tests used to determine an independent contractor relationship also be used to determine an employer-employee relationship; and that the social and economic purposes of the Act be disregarded in mak-

ing the determination. The Board's own findings of fact, in the present case, preclude a legal conclusion that Greyhound is an employer in the premises. Therefore, the Board has no jurisdiction over Greyhound.

Congress has vested the District Courts of the United States with original jurisdiction of any civil action arising under any Act of Congress regulating commerce, such as the National Labor Relations Act. That jurisdiction includes the power to enjoin and vacate administrative determinations made in excess of statutory authority. In providing a limited means of obtaining review of a representation determination through the tedious and uncertain method of reviewing an unfair labor practice order, the Congress has not precluded judicial intervention where the Board has acted without statutory authority.

The judicial proceeding in the present case is to stop the Board from violating Greyhound's right not to be a party in a proceeding in which Greyhound is not an employer. The Board's error of statutory construction, reflected on the face of the Board's Decision and Direction of Election, is a final determination because there are no further administrative remedies to exhaust.

Remedy by way of an original action is no less available to an employer than to a union, because there is no basis for a distinction. This is particularly true since the 1947 amendments to the Act make both unions and employers subject to unfair labor practice charges.

*Leedom v. Kyne*, 358 U. S. 184, supports district court jurisdiction in the present case. In both cases, the Board had acted in excess of its statutory authority. The union, in *Kyne*, could have pursued the statutory review procedure. In the present case, Greyhound could have pursued that procedure. In neither case, was the review procedure adequate or exclusive.

*McCulloch v. Sociedad Nacional*, 372 U. S. 10, clearly enunciates the principle that a district court has jurisdiction to enjoin a representation election in a case wherein the Board does not have jurisdiction.

**ARGUMENT.****Introduction.**

As a predicate for the detailed argument that the District Court had jurisdiction in the present case, the statutory elements which pervade the entire problem are briefly described.

The existence of an employer-employee relationship is an absolute condition precedent to a representation proceeding under the Act. Absent that relationship, there is no jurisdiction in the Board.<sup>3</sup>

The Board derives its statutory authority in representation matters from Section 9 of the Act (P. A. 34-36), which clearly provides that a representation proceeding leading to election and/or certification is limited to a proceeding between the representative of employees and the employer of those particular employees. Where the employment relationship exists under the Act, it exists for purposes of collective bargaining as provided in Section 9(a) (P. A. 34). The subject matters of collective bargaining as defined in Section 9(a) are "rates of pay, wages, hours of employment, or other conditions of employment . . .". The consequence of an employer's refusal to bargain with the duly designated and selected representative of his employees is the prosecution of an unfair labor practice charge pursuant to Section 8(a)(5) of the Act (P. A. 34).

Section 2(3) of the Act (P. A. 33) does not define the term "employee" except by way of certain exclusions and certain inclusions. The Congress amended Section 2(3) of the Act in 1947 to prohibit the Board from classifying

3. *National Labor Relations Board v. Interior Enterprises, Inc.*, (9 Cir. 1961) 298 F. 2d 147, 150; *Hearst Publications, Inc. v. National Labor Relations Board*, (9 Cir. 1943) 136 F. 2d 608, 611; *United Insurance Co. of America v. National Labor Relations Board*, (7th Cir. 1962) 304 F. 2d 86.

persons as employees who did not work for hire for the person alleged to be the employer.<sup>4</sup>

What the Board did in the present case was to make findings of fact on the face of its Decision and Direction of Election which, under the legislative history referred to above, precluded a legal conclusion that Greyhound was an employer with regard to the employees in the proposed unit. The Board undertook to proceed further with respect to Greyhound, although it had no jurisdiction to do so.

Thus, the situation in the present case is analogous to a hypothetical case in which the Board would make findings of fact, not disputed, that an employee possesses the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, etc., and yet would make a determination that such employee was not a supervisor. Section 2(3) of the Act (P. A. 33) excludes from the term "employee" any individual employed as a supervisor. Section 2(11) of the Act defines the term "supervisor".<sup>5</sup>

In the present case, the Board's Decision and Direction of Election followed a hearing and was *final*, in that there exists no further opportunity for administrative review of this determination. The District Court had statutory jurisdiction<sup>6</sup> to enjoin the Board from proceeding beyond the scope of its jurisdiction.

No decision of this Court and no congressional history with reference to the limited review provisions of the

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4. Section 2(3): "the term 'employee' . . . shall not include any individual having the status of an independent contractor . . ." The legislative history is set forth at length under specific argument on this point, *infra*, pages 10, 11. See also, *National Labor Relations Board v. Steinberg*, 182 F. 2d 850, 854; *Site Oil Company v. National Labor Relations Board*, 319 F. 2d 86.

5. "(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

6. 28 U. S. C. 1337, *infra*, p. 42.



National Labor Relations Act<sup>7</sup> directly or by inference forecloses jurisdiction in the District Court in the present case. Where, as in the instant case, the Board did not have jurisdiction, no part of the National Labor Relations Act has further application to the proceedings, including the statutory review provisions of Sections 10(e) and (f).

## I.

### **The Board Acted Beyond Its Statutory Authority and Without Jurisdiction.**

The congressional intent in amending Section 2(3) of the Act in 1947, so as to exclude from the term employee "any individual having the status of an independent contractor" (P. A. 33), was to require the Board and the courts, in interpreting and applying the Act in representation cases, to give the term "employee" the recognized judicial meaning of that term as historically used, without regard to the social and economic purposes of the Act. When established legal concepts are applied to the findings of fact stated in the Board's Decision and Direction of Election, the legal conclusion is required that Greyhound is not an employer in the present case.

#### *A. Congressional Intent.*

In enacting amended Section 2(3) of the Act, the Congress clearly expressed its intent as the same is reflected in the legislative history.<sup>8</sup> From the legislative his-

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7. Section 10(e) and (f) (P. A. 36-38).

8. The House Committee Report reads, in part, as follows: "An 'employee', according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire." But in the case of *National Labor Relations Board v. Hearst Publications, Inc.*, (322 U. S. 111 (1944)), the Board expanded the definition of the term 'employee' beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. In this case the Board

tory it was unquestionably the intent of Congress to nullify this Court's ruling in the *Hearst* case, cited in the legislative history. As was stated in *United Insurance Company of America v. National Labor Relations Board*, (7 Cir. 1962) 304 F. 2d 86:

"It is conceded the amendment was intended by Congress to nullify the Supreme Court ruling in *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170."

The congressional intent was not merely to exclude independent contractors from the definition of the term "employee", but was to furnish to the Board and to the courts a basis for determining when the employer-employee relationship exists and when it does not exist. In the *Hearst* case, this Court recognized that the so-

held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees'. The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors'. 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employee.'" H. Rep. 245, 80th Cong., 1st Sess., p. 18. Vol. 1, Legislative History of the Labor-Management Relations Act, 1947, page 309. The Conference Report *folk vs* the House Committee Report. H. Rep. 510, 80th Cong., 1st Sess.; U. S. C. Cong. Serv. 80th Cong., 1st Sess., p. 1138.

called "common-law standards" for determining when one is an employee are the same "common-law standards" used to determine when one is an independent contractor (322 U. S. at 120). However, in *Hearst*, this Court determined that Congress had not used the word "employee" as a term of art having a definite meaning, but that Congress had in mind at least some other persons than those standing in the proximate legal relationship of employee to the particular employer involved in a labor dispute (322 U. S., at 124). This Court based its determination upon the social and economic purposes of the Act (322 U. S., at 126-130. This Court's decision in *Hearst*, nullified by the 1947 amendment to the Act, as clearly shown in the legislative history, had reversed *Hearst Publications, Inc. v. National Labor Relations Board*, (9 Cir. 1943) 136 F. 2d 608. In that case, the Ninth Circuit held that the legislature is presumed to use words in their ordinary sense unless that sense is contradicted by "context of a statute, and stated:

"The dictionary definition of 'employee' is 'one employed by another; one who works for wages or salary in the service of an employer,' Webster's New International Dictionary, 2d Ed. 1937."

**B. As a Matter of Law, Greyhound Is Not an Employer.**

The Decision and Direction of Election in the present case shows on its face findings of fact clearly demonstrating that only Floors, and not Greyhound, is the employer. These findings show that Floors hires, pays, disciplines, transfers, promotes and discharges the porters, janitors and maids (R. 10; this brief, *supra*, p. 3). One who possesses these authorities and exercises them is the employer.\*

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9. *United States of America v. Silk*, (1947) 331 U. S. 704; *Greyhound Lines, Inc. v. Harrison*, 331 U. S. 704; *National Labor Relations Board v. Steinberg*, (5th Cir. 1950) 182 F. 2d 850; *National Van Lines, Inc. v. National Labor Relations Board*, (7 Cir. 1960), 273 F. 2d 402.

Moreover, it is clear from the record before this Court, specifically including the contracts between Greyhound and Floors (R. 16-34) and the order and findings of fact of Judge Simpson, construing the contract between Greyhound and Floors (R. 35-41), that the relationship between Greyhound and Floors is that of owner and independent contractor. A basic element of an independent contractor relationship is that where the independent contractor employs employees to perform the contracted services, the employees are his employees and not those of the owner.<sup>10</sup> The fact that the owner<sup>11</sup> possesses or exercises a degree of control to see to the ultimate performance of the contract in no way makes the owner an employer of the employee of the independent contractor. This Court stated, in *National Labor Relations Board v. Denver Building and Construction Trades Council*, *infra*, that the fact that the contractor had some supervision over the subcontractor's work did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other (341 U. S., at 688-690). In *United States v. Silk*, *supra*, this Court stated, at 331 U. S., page 714:

"There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution."

In *Hearst Publications, Inc. v. National Labor Relations Board*, *supra*, the Ninth Circuit found that sub-

10. *National Labor Relations Board v. Denver Building and Construction Trades Council*, (1951) 341 U. S. 675, 687-690; *Greyvan Lines, Inc. v. Harrison*, 331 U. S., at 712; *United States v. Silk*, 331 U. S., at 712; *Greyvan Lines, Inc. v. Harrison*, (7 Cir. 1946) 156 F. 2d 412; *National Van Lines, Inc. v. National Labor Relations Board*, (7 Cir. 1960), 273 F. 2d 402; *National Labor Relations Board v. Carroll*, (1 Cir. 1941) 120 F. 2d 457.

11. The term "owner", as used in this brief, refers to the person engaging the services of the independent contractor.



stantial control in the owner over the end result performed by the employees of the independent contractor was insufficient to constitute the owner the employer of the employees of the independent contractor under Section 2(3) of the Act, even prior to the 1947 amendment of that section.

In *Williams v. United States*, (7 Cir. 1942) 126 F. 2d 129, a case involving liability for social security taxes, the Court was confronted with the question of whether a band leader was an independent contractor and thus the employer of the musicians in his band, or whether each establishment which employed the band by contract with the band leader was the employer. At page 133, the Court held:

"We have already concluded, not inconsistent with the findings of the court below, that the establishments had no right to hire or discharge members of the orchestra. To our mind, this circumstance alone comes near being decisive. It is difficult to conceive of an employer-employee relationship without such a right on the part of the employer. It is equally inconceivable that such right should rest solely in the hands of the employee. Without this right there could be no effective control by an employer. As was said in *Pioneer Construction Co. v. Hansen*, 176 Ill. 100, 108, 52 N. E. 17, 19: " \* \* \* and, inasmuch as the right to control involves the power to discharge, the relation of master and servant will not exist unless the power to discharge exists. " \* \* \* "

And in the same case, the Seventh Circuit, in discussing the fact that the District Court had made much of numerous findings of control on the part of the establishments hiring the band, said, at page 131:

"For aught that is found, such acts might have represented isolated incidents and not the usual and ordinary relation existing between plaintiff and the establishments. A finding as to what was done 'at

times is of such indefinite and uncertain meaning as to furnish little, if any, support for a conclusion predicated thereon. Furthermore, we are of the view that any acts of control 'at times' exercised by the establishments are relatively unimportant when compared with other facts found by the court and disclosed by plaintiff's contracts with the establishments, as well as with the usual manner in which the services of the orchestra were performed."

In *National Labor Relations Board v. Carroll, supra*, the First Circuit held that the fact that the owner might require the suspension of an employee of the independent contractor did not change the fact that the employee was the employee of the independent contractor and not of the owner.

Only where the two alleged employers occupy a joint or intercorporate relationship, can both be required to bargain with or be responsible for the labor relations of the employees.<sup>12</sup>

In *National Labor Relations Board v. Aluminum Tubular Corporation and American Flagpole Equipment Co., Inc.* (2 Cir. 1962), 299 F. 2d 595, the Court, in holding that common ownership and direction are not always sufficient to create a joint employer situation, stated, at page 599:

"Closer to the point but not close enough are cases where a parent or affiliate controlling another company's labor policies has been held for participating in or directing various unfair labor practices affecting the subservient firm's employees, e.g., *N. L. R. B. v. Condenser Corp. of America*, 128 F. 2d 67 (3 Cir. 1942), *N. L. R. B. v. Somerset Classics, Inc.*, 193 F. 2d 613 (2 Cir.), cert. denied, *Modern Mfg. Co. v. N. L. R. B.*, 344 U. S. 816, 73 S. Ct. 10, 97 L. Ed. 635 (1952). Any order to the controlling company with respect to bargaining

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12. *National Labor Relations Board v. Hearst, et al.*, (9 Cir. 1939) 102 F. 2d 658.

in those cases, see also *N. L. R. B. v. Swift & Co.*, 127 F. 2d 30 (6 Cir. 1942), was one directing it to cause the other firm, whose business was continuing, to bargain with that firm's own employees, and enjoining the controlling company from interfering with that process; the controlling company was in no instance forced to recognize the certified union as representing employees now its own."

Two very recent cases emphasize the Board's clear error of statutory construction in the present case. They are, *Site Oil Company v. National Labor Relations Board*, (8 Cir. 1963) 319 F. 2d 86, and *National Labor Relations Board v. Howard Johnson Company*, (3 Cir. 1963) 317 F. 2d 1. In *Site*, the Court found an independent contractor relationship to exist and not an employer-employee relationship, although the work was performed on the owner's premises and the owner retained substantial control over the performance of the work. The Eighth Circuit strongly relied upon the legislative history of the 1947 amendment to Section 2(3) of the Act. In *Howard Johnson*, that company contended that it was not the employer of the employees in the proposed unit, because substantial control had been retained by contract in the owner. The Board and the Court both found that Howard Johnson, rather than the owner, was the employer, primarily because the employees were hired, fired, paid by, and under the direction and supervision of Howard Johnson. In spite of the owner's substantial control over even the details of operation, the owner was found not to be an employer.

In the present case, after finding that Floors hires, pays, disciplines, transfers, promotes and discharges the porters, janitors and maids, the Board then made the findings upon which depends its conclusion that Greyhound is also an employer. These findings are (a) that Greyhound's terminal managers confer with Floors' supervisors in setting up work schedules and in determining the number of

employees required to meet these schedules; (b) Floors' supervisors may visit the Greyhound terminals on an irregular basis and on occasion may not appear for as much as two days at a time, and that the employees in the unit receive work instructions from Greyhound terminal officials; and (c) that Greyhound on one occasion prompted the discharge of a porter whom it felt to be an unsatisfactory employee (R. 10; this brief, *supra*, pp. 3-4). The cases hereinabove cited in this section of the brief clearly demonstrate that the elements of alleged "control", which the Board found Greyhound to possess, neither singly nor collectively permit a conclusion that Greyhound is an employer in the present case.

*C. The Board Has No Jurisdiction Over Greyhound.*

Inasmuch as the Board's jurisdiction derives solely from the Act, and inasmuch as the Board acted beyond the scope of that authority in the present case, the Board is without jurisdiction over Greyhound in the premises.

In *United Insurance Company of America v. National Labor Relations Board*, (7 Cir. 1962) 304 F. 2d 86, at page 89, the Court said:

"In 1947, Congress amended the National Labor Relations Act so as to prohibit the National Labor Relations Board from assuming jurisdiction over independent contractors. It is conceded the amendment was intended by Congress to nullify the Supreme Court ruling in *N. L. R. B. v. Hearst Publications, Inc.*, 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170."

In *National Labor Relations Board v. Interior Enterprises, Inc.*, (9 Cir. 1961) 298 F. 2d 147, the Court held, at page 150, that where a respondent is not an employer within the meaning of the Act, the Board has no jurisdiction to enter an order against the respondent.



## II.

**The District Courts Have Jurisdiction to Enjoin an Administrative Act Beyond Statutory Authority.**

By Section 24(8) of the Judicial Code,<sup>13</sup> Congress has vested the district courts with original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce. The present case is a civil action arising under an Act regulating commerce.<sup>14</sup>

The fundamental concept of the role of the courts in controversies involving the invalidity of an order or ruling of an administrative agency is expressed in *Stark v. Wickard*, 321 U. S. 288, 309, 310:

"When Congress passes an Act empowering administrative agencies to carry on government activities, the power of those agencies is circumscribed by the authority granted. . . . The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. . . . But under Article 3, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power."

Although an administrative officer may be authorized by statute to adjudicate a matter upon receipt of satisfactory evidence, "This does not authorize denial of a claim if the undisputed facts establish its validity as a matter of law, or preclude the courts from ascertaining whether the conceded facts do so establish it." *Dismuke v. United States*, 297 U. S. 167, 172, 173.

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13. 28 U. S. C. § 1337.

14. *Capital Service, Inc. v. National Labor Relations Board*, 347 U. S. 501, 504.

In *United States of America v. American Trucking Association, Inc.*, 310 U. S. 534, this Court stated, at page 542:

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress."

And at page 544, this Court further stated:

"The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said."

In *Deering Milliken, Inc. v. Johnston, Regional Director of the National Labor Relations Board*, (4 Cir. 1961) 295 F. 2d 856, the Court affirmed jurisdiction in the District Court to compel the Board to act expeditiously in an unfair labor practice case. At page 861, the Court stated:

"The jurisdiction of the federal courts to enjoin acts of a federal administrative agency in excess of the agency's statutory authority was recognized as early as 1902. This recognition of the jurisdiction of the federal courts has carried through a long line of cases to the present time."

Judge Haynsworth cites many decisions of this Court, beginning with *Marbury v. Madison*, 5 U. S. 137.

In *Leedom v. Kyne*, 358 U. S. 184, 185, this Court stated:

"The sole and narrow question presented is whether a Federal District Court has jurisdiction of an original suit to vacate that determination of the Board because made in excess of its powers."<sup>15</sup>

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15. The Court found jurisdiction to exist. The *Kyne* case will be discussed more fully in a later portion of this brief.

As in *Kyne*, this Court approved the issuance of an injunction against representation proceedings in *McCulloch v. Sociedad Nacional*, 372 U. S. 10.

Neither this Court nor any United States Court of Appeals, subsequent to *Kyne*, has held that a district court has no jurisdiction to enjoin an administrative action beyond statutory authority. Thus, a district court has jurisdiction unless there is a compelling statutory basis limiting or proscribing such jurisdiction. The Board's brief contends that there are several reasons why the District Court does not have jurisdiction. This brief will meet each of such contentions.

***A. Congress Has Not Precluded Suits by Employers to Enjoin Representation Elections Where the Board Has Acted in Excess of Its Statutory Authority.***

Beginning with page 10 of the Board's brief is a recitation of the legislative history of the National Labor Relations Act with reference to review procedures provided by the Act. None of the legislative history recited sustains an argument that the Congress intended to inhibit the courts in exercising their statutory jurisdiction in an original action pursuant to Section 24(8) of the Judicial Code. What Congress intended was to prevent a review proceeding of orders of the Board in cases where the Board had jurisdiction and where disputed facts existed. Upon such a review as provided in Section 9(d) and Section 10(e) and (f) of the Act (P. A. 36-38), the matter to be reviewed is whether or not a Board order in an unfair labor practice proceeding is supported by substantial evidence.<sup>16</sup>

As the Court held in *Leedom v. Kyne*, 358 U. S. 184, an action of the Board clearly contrary to the statute may be enjoined. None of the legislative history of the review provisions of the Act reflects an intention on the part of

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16. *Universal Camera Corporation v. National Labor Relations Board*, 340 U. S. 474; *National Labor Relations Board v. Walton Manufacturing Company*, 369 U. S. 404.

Congress to deprive the courts of such power, although the Congress perhaps could have done so by expressly limiting the existing statutory jurisdiction of the district courts.

In providing for statutory review in the Act, Congress did not intend to prohibit or delay intervention by the district courts in cases where it clearly appears from the face of the Board's own decision that the Act no longer applies and that the Board has no party or subject matter with reference to which it may proceed. The legislative history reflects that the Congressional purpose was to prevent delays by resort to the courts, where the Board still had before it a matter clearly within its jurisdiction. The present case falls outside of the category of such cases.

Nor do the decisions of this Court interpret the legislative history contrary to the contention of Greyhound. In *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401, an attempt was made to obtain direct review in a Circuit Court of Appeals. At pages 404, 405, the Court defined the question in that case as follows:

"The single issue which we are now called on to decide is whether the certification by the Board is an 'order' which, by related provisions of the statute, is made reviewable upon petition to the Court of Appeals for the District or in an appropriate case to a circuit court of appeals. The question is distinct from another much argued at the Bar, whether petitioners are precluded by the provisions of the Wagner Act from maintaining an independent suit in a district court to set aside the Board's action because contrary to the statute, and because it inflicts on petitioners an actionable injury otherwise irreparable."

In the *American Federation of Labor* case, the question distinguished from the issue before the Court was specifically preserved, at page 412.

In *Inland Empire District Council, etc. v. Millis*, 325 U. S. 697, 700, this Court again preserved for a proper



case the determination of district court jurisdiction with regard to representation cases until a case should come before the Court showing that the Board has acted unlawfully.

Grayhound, in this case, presents precisely the sort of situation preserved by the Court for determination, and the District Court did have jurisdiction.

**B. *Leedom v. Kyne* Supports Jurisdiction in This Case.**

Independently of the decision of this Court in *Leedom v. Kyne*, 358 U. S. 184, the District Court had original jurisdiction because of the nature of the case. Nevertheless, it is clear that *Leedom v. Kyne* does support the present case.

*Kyne* and *Grayhound* are identical in at least the following respects: (1) the Board's action was contrary to statute; (2) the suits were not suits to review decisions of the Board made within its discretion and within its jurisdiction, but were original actions to vacate Board action without authority in law; (3) the Board attempted to exercise power specifically withheld; (4) the rights of the complaining parties were adversely affected by the Board's action; (5) the injunctions were obtained during the course of representation proceedings; and (6) the facts were undisputed.

The Board's argument completely disregards the fact that the District Court in the present case determined upon the basis of undisputed facts that the Board had no jurisdiction as to *Grayhound*. This presents even a stronger case for judicial intervention than was present in *Kyne*.

The Board has cited in footnote 18, beginning at page 17 of its brief, the reported cases which have considered the doctrine of *Kyne* as related to the particular fact before the respective courts. Every reported case, following *Kyne*, has specifically recognized jurisdiction in the district courts where the Board has clearly acted beyond the scope

of its statutory powers. In those cases finding that district court jurisdiction did not exist, the determination has been made upon the facts in each case, always disputed, that no action in excess of statutory powers was demonstrated.

In footnote 18, on page 18, the Board cites three court of appeals' decisions discussing the applicability of *Kyne*, in which the courts have held that district court jurisdiction did not exist. The first of these cases is *UNA Chapter v. National Mediation Board*, (D. C. Cir. 1961) 294 F. 2d 905. The court in that case followed the decision of this Court in *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, and pointed out that the *Switchmen's Union* case had been distinguished by this Court in *Kyne*, in that the bargaining unit determined by the Mediation Board adhered to a prescribed statutory pattern. The second case is *Air Line Stewards and Stewardesses Assoc. v. National Mediation Board*, (D. C. Cir. 1961) 294 F. 2d 910. Here again, the Court distinguished *Kyne* on the basis of the distinction which this Court had made in *Kyne*. The third case is *WES Chapter v. National Mediation Board*, (D. C. Cir. 1962) 314 F. 2d 234. In that case, the Court held that the Board had not refused to act and had not acted in excess of its delegated powers, thus distinguishing *Kyne*.

An important consideration is the fact that in *Kyne* the Board admitted an act in excess of statutory authority, but insisted upon its historical position that, whatever the circumstances, the review provisions of Section 9(d) and Sections 10(e) and (f) were exclusive of all other types of judicial intervention.

1. THIS SUIT IS NOT PREMATURE BECAUSE ITS PURPOSE  
IS TO PREVENT AN ELECTION.

The Board's brief, beginning at page 20, argues that Greyhound's suit was premature because of a failure to exhaust administrative remedies. The Board's argument is self-defeating when considered as a whole, because the

over-all argument is that the District Court was without jurisdiction to entertain the suit either before or after election. The Board's basic argument is that the District Court never has jurisdiction and that the only method of attacking the validity of the Board's determination is to wait for a final order in an unfair labor practice proceeding.

The fact is that Greyhound's administrative remedies were completely exhausted before it brought the suit. The suit followed a hearing (and Greyhound does not attack the jurisdiction of the Board to conduct the hearing). After the hearing a *final* administrative determination had been made that Greyhound was an employer when, as a matter of law, the Board's own Decision and Direction of Election shows that Greyhound is not an employer. Neither the Act nor the rules of the Board provide for any administrative review of that determination. In *United Dairies, Inc.*, 144 N. L. R. B. No. 40 (August 22, 1963), the Board held:

"The Board has long refused to permit relitigation in subsequent unfair labor practice proceedings of issues determined previously in representation proceedings."

Therefore, the entire argument that Greyhound's suit was premature is without foundation. Greyhound certainly cannot be compelled to exhaust remedies which do not exist.

In support of its contention that Greyhound must exhaust administrative remedies prior to filing its suit, the Board cites *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-52; *Whitehouse v. Illinois Central R. R. Co.*, 349 U. S. 366, 373-374; and *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752, 767-768.

In the *Myers* case, both the employer and his employees sought to enjoin the holding of a hearing in an unfair labor practice case, on the ground that the provisions of the Act are not applicable to the employer. The action in the *Myers* case was brought prior to a hearing, without an opportunity on the part of the Board even to make findings of fact or a determination upon which the

Court could act. There was no claim by the employer that the statutory provisions or the rules of procedure prescribed for such hearings were illegal (303 U. S., at p. 47). The present case is clearly distinguishable from *Myers* in that, in the present case, the Board had already conducted the hearing and had made findings of fact which demonstrated that the Board was without jurisdiction. Relief was sought prior to any decision on the merits by the National Labor Relations Board (303 U. S., at p. 46). This Court held that the case was presented in the abstract and that there was no shewing of invalidity.

Similarly, in *Whitehouse* (349 U. S., at p. 373): "Here relief is sought prior to any decision on the merits by the Board," and a ruling was sought "... in the abstract

In *Aircraft & Diesel*, the action was one for a declaratory judgment and injunction involving the constitutionality of the First and Second Renegotiation Acts. The Court found that equitable relief required something more than a mere suggestion of claim to bring into play judicial power, and that the plaintiff had an action at law to obtain greater relief than that sought. The case was not decided on jurisdictional lines, but purely on the basis of facts.

In *McCulloch v. Sociedad Nacional*, 372 U. S. 10, this Court approved a pre-election injunction of a Board Representation proceeding when it became clear that the Board did not have jurisdiction and that the Act had no application.

The doctrine of exhaustion of administrative remedies does not apply when the administrative agency has no jurisdiction. This Court clearly enunciated this principle in *Skinner & Eddy Corp. v. U. S.*, 249 U. S. 557. The case involved an ICC order permitting an increase in railroad rates for the shipment of steel from Pittsburgh to Seattle. At that time the Interstate Commerce Act Section 4 provided:



"Whenever a carrier by railroad shall be in competition with a water route . . . and reduce the rates of carriage . . . to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

The railroads had previously decreased competitive rates and the ICC had allegedly made no finding of changed conditions other than decreased water competition in permitting the new increase. The shippers sued to enjoin the rate increase and the government argued failure to exhaust administrative remedies. The court denied this claim by the government, stating:

"The contention is that the Commission has exceeded its statutory powers; and that, hence the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission." 249 U. S. at 562.

The court went on to deny the plaintiffs' request for an injunction holding the ICC had acted within its powers.

The *Skinner & Eddy* decision was followed in *Varney v. Warehouse*, (6 Cir. 1945) 147 F. 2d 238. The plaintiffs, milk handlers, sued to enjoin an order of the War Food Administrator claiming they were not within his jurisdiction under the federal statute. The administrator argued that the plaintiffs had failed to exhaust their administrative remedies. The court cited *Skinner & Eddy* with approval, and stated:

"Failure to exhaust administrative remedies generally precludes resort to the courts (citations omitted). However, this is not an ironclad rule and it has no appli-

cation where the defect argued goes to the jurisdiction of the administrative agency." 147 F. 2d at 243.

The court, however, denied the plaintiffs' claim, holding they were properly controlled by the defendant.

In *Bernstein v. Herren*, (S. D. N. Y. 1955) 136 F. Supp. 493, affirmed (2 Cir. 1956), 234 F. 2d 434; similar language exists. Two army inductees sued to enjoin their commanding officers from considering their pre-induction records in giving them a dishonorable discharge. The court answered the government's argument claiming a failure to exhaust administrative remedies with the following statement:

"a well-recognized exception to the requirement of the exhaustion of administrative remedies exists where the action of the administrative body is jurisdictionally defective, in violation of the plaintiffs' legal rights under statute." 136 F. Supp., at 496.

In *Schwebel v. Orrick*, (D. D. C. 1957) 153 F. Supp. 701, affirmed on other grounds (D. C. Cir. 1958), 251 F. 2d 919; a New York state court judge sued to enjoin the SEC from prosecuting a disciplinary proceeding against him for his allegedly unethical conduct before that commission. The government again argued that the plaintiff had failed to exhaust his administrative remedies. The court, which later held the disciplinary proceeding to be proper, denied this contention with the following language:

"It is elementary law that as a general rule administrative remedies must first be exhausted before one aggrieved is entitled to court review, but this wise rule is not without exceptions necessary to preserve the fundamental rights of the litigant or to prevent a violation of express statutory limitations placed by the Congress upon the powers or actions of the administrative body." 153 F. Supp., at 703-04.

The court further stated:

"Counsel for the government concedes that cases where it is clearly apparent that the administrative body is attempting to act entirely outside its lawful jurisdiction would fall within the exception to the general rule." 153 F. Supp., at 704.

In the present case, Greyhound acted as soon as the invalidity of the Board's determination was evident, and the action was simply one to terminate all further proceedings as to Greyhound, because the Act under admitted facts did not apply to Greyhound in the premises.

**2. REMEDY IS NO LESS AVAILABLE TO GREYHOUND THAN TO A UNION.**

The true issue in this case is the jurisdiction of district courts to stop the Board from proceeding beyond the scope of its jurisdiction. The Board argues, beginning at page 23 of its brief, that there is a difference between a district court's right to act at the suit of an employer, as opposed to a suit brought by a union. The Board's argument overlooks the fact that in the present case there was no jurisdiction in the Board whatsoever. In *Leedom v. Kyne*, 358 U. S. 184, the Court made no such distinction as that argued by the Board. As a matter of fact, the union in *Kyne* had just as great an opportunity to review the Board's determination under the review provisions of the Act as does Greyhound in the instant case. It is interesting to note that the minority justices in *Kyne* complained that the result of the majority's decision would be that "Both union and management would be able to use the tactic of litigation to delay the initiation of collective bargaining when it suits their purposes," at page 196.

In arguing the case before this Court in *Leedom v. Kyne*, the Board took a position contradictory to its pres-

ent position. The Board's argument is stated in footnote 12, at pages 22-23, of the Board's brief in *Kyne*.<sup>17</sup>

A further commentary upon this subject is found at page 219, Volume 73, Number 1, Harvard Law Review, November 1959, wherein the author discusses the *Kyne* case:

17. Footnote 12 of that brief is as follows: "The only conceivable way that a 'losing' union could obtain review under Section 9(d) of a certification issued to another union is by violating Section 8(b)(4)(C) of the amended Act. That is, were the 'losing' union to picket for recognition notwithstanding the certification, it would subject itself to an 8(b)(4)(C) charge. In the unfair-labor-practice proceeding, the union could then proceed to contest the validity of the underlying certification, and, should the Board overrule this contention and issue an unfair-labor-practice order; this order, together with the underlying certification, could be brought before the Court of Appeals pursuant to Section 9(d). Cf., however, *Meat & Provision Drivers Union*, 115 N. L. R. B. 890, 891, 901; *Parks v. Atlanta Printing Pressmen & Assistant's Union*, 243 F. 2d 284 (C. A. 5), certiorari denied, 354 U. S. 937; *Tungsten Mining Corp. v. District 50, etc.*, 242 F. 2d 84 (C. A. 4), certiorari denied, 355 U. S. 821.

"The union here, of course, was certified, so that it was in a better position to obtain review of the certification under Section 9(d). Just as Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain with the union which is the representative of his employees, Section 8(b)(3) makes it an unfair labor practice for that union to refuse to bargain with the employer. Accordingly, the Engineers Association, contending that the Board's certification of a combined unit of professional and nonprofessional employees was erroneous, could insist that Westinghouse bargain with it solely on behalf of the professional employees. The Engineers Association would thus subject itself to a charge, filed either by the employer or the nonprofessional employees in the unit, that it had refused to bargain, as required by Section 8(b)(3); and, should the Board so find and issue an order requiring the Engineers Association to bargain for all of the employees in the certified unit, the Engineers Association could obtain review of that order and the underlying certification in the Court of Appeals, pursuant to Sections 9(d) and 10(e) and (f) of the Act, just as the employer could if he were contesting the certification. Cf. *Dowds v. International Longshoremen's Association*, 147 F.2d Supp. 103, 109, 110-112 (S. D. N. Y.), affirmed, 241 F. 2d 278, 282 (C. A. 2). However, the court below concluded (p. 8, n. 4, *supra*; R. 39) that this procedure was inadequate because it was not likely that either the employer or the nine nonprofessionals would file unfair-labor-practice charges if the union refused to bargain for the latter. We believe that the Court's assumption is unwarranted, particularly insofar as the filing of charges by the nine nonprofessionals is concerned."



"Also, a recent lower-court decision has found the present case inapplicable to employers, on the ground that they have an effective means of obtaining review in the refusal-to-bargain procedure. There is some indication in the present case, however, that the Supreme Court does not consider that procedure adequate. The majority opinion emphasizes that the professional employees had no means of review 'within their control.' But since the association had won the certification election, it could have obtained review by bargaining on behalf of the professional employees alone, and ignoring the unit certified by the NLRB. This would have subjected it to a section 8(b)(3) unfair-labor-practice charge, which would bring the same opportunity for review under section 10(f) as is available to the employer. While this procedure was beyond the control of the association, inasmuch as it depended upon the filing of an unfair-labor-practice charge, the parallel procedure available to the employer is subject to the same defect. It is true, that a union with which an employer refuses to bargain is more likely to file a charge than is either the employer with whom the union refuses to bargain on behalf of the entire unit certified or the employee whom the union refuses to represent; but this distinction does not go to the availability of 'control' over the review procedure."

In *Empresa Hondureña de Vapores, S. A. v. McLeod*, (2 Cir. 1962) 300 F. 2d 222, the Board made both contentions that are made here: (1) that the action was premature as being one to enjoin an election, and (2) that the employer had no right to bring the action. The Second Circuit rejected both contentions and with reference to the fact that the action was brought by an employer, pointed out: "... the possibility of the plaintiff's precipitating an unfair labor practice charge was present in *Leedom v. Kyne* itself; yet the court evidently did not deem this

fatal." When the *Empresa* case was brought to this Court, it was consolidated for the purposes of opinion with two cases wherein unions were plaintiffs, and the Court decided all of the issues in *McCulloch v. Sociedad Nacional*, 372 U. S. 10. The Board had control of all three cases as they were presented to this Court, and chose to raise the jurisdictional question only in the employer's case. Thus, this Court found it unnecessary to rule upon the jurisdictional question in *Empresa*. Had the jurisdictional question been raised in *Sociedad*, it was obvious that the union had a remedy pursuant to the review provisions of the Act, because it easily could have induced a charge against it by committing an unfair labor practice.

At least since the enactment of the Taft-Hartley Act in 1947, making unions subject to unfair labor practices as well as employers, there is no credible basis for distinguishing between the rights of an employer and the rights of a union to obtain judicial relief where statutory rights have been violated.

The Board takes the further position that Greyhound should have waited for the results of an election before seeking judicial relief, because the matter would become moot if the union lost the election. The determination that Greyhound is an employer in the present case could never become moot until that determination was vacated by a court. For instance, if the union lost the election, the same union or another union could, at the end of a twelve-months' period, petition for another election, and obtain another direction of election.<sup>18</sup> In this event, the Board could rely upon its determination in the present case that Greyhound is an employer, and the only issue subject to Section 10 review would be the propriety of the Board's reliance upon a prior determination.<sup>19</sup>

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18. Section 9(c)(3) provides in part: "No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve month period a valid election shall have been held."

19. *Boyles Galvanizing Company of Colorado v. Waers, Regional Director*, (10 Cir. 1961) 291 F. 2d 791.

Again referring to the inadequacy of Section 10 review proceedings, it is noted that the event which gave rise to the litigation between Greyhound and the Union over the Greyhound-Floors contract (R. 35-41) was the Union's threat to initiate a system-wide strike against Greyhound if the contract were put into effect.<sup>20</sup> In the face of the District Court's determination that there is no employer-employee relationship between Greyhound and Floors' employees, a strike or picketing directed against Greyhound would constitute an unfair labor practice on the part of the Union. (See footnote 24(a), *infra*, page 35.) If the decision of the District Court were reversed, the Union could picket even before an election, unless Greyhound can prove a good faith doubt as to majority representation.<sup>21</sup>

Moreover, if, for the purpose of collective bargaining, Greyhound be made a joint-employer with Floors, the mutually beneficial contract between Greyhound and Floors will have no basis for continued existence.<sup>22</sup>

Should the employer be made to follow the tortuous and uncertain course of proceeding with the election, a refusal to bargain, a possible unfair labor practice charge for refusal to bargain, a hearing on those charges, and an enforcement proceeding by the Board and/or a petition for review by the employer in a circuit court of appeals, Greyhound could still be required to bargain with employees not its own prior to any judicial review. This is so, because under

20. Paragraph 5 of Judge Simpson's findings of fact in that case states that the Union gave notice to Greyhound that if the contract were put into effect "a strike of the operators and terminal employees would occur, forcing a suspension of the company's entire motor bus operations" (R. 38). Paragraph 6 of the same findings is "The Union advised the company that it deemed the proposed contract with Floors, Inc., in violation of the agreement of August 19, 1953, and that the threat of a general strike against the company's operation would continue and a strike occur if that contract were activated" (R. 39).

21. *National Labor Relations Board v. Knickerbocker Plastic Company, Inc.*, (9 Cir. 1955) 218 F. 2d 917.

22. Brief of Floors, Inc., as amicus curiae, pp. 26-27.

Section 10(j) of the Act<sup>23</sup> the Board could bring an injunction proceeding in a district court for a temporary restraining order pending appeal, requiring Greyhound to bargain. In such an event, the injunction should issue upon probable cause and the probable cause would certainly exist, because Greyhound would have openly declined to bargain under the circumstances.<sup>24</sup>

The equity jurisdiction of the District Court was properly invoked. Inadequacy of any other remedy and the threat of irreparable harm and damage to Greyhound is demonstrated by the real threat of a system-wide strike, of ruinous picketing, of unwarranted delay, of compulsory bargaining prior to any other judicial determination, and of the probability of a destruction of mutually profitable contract relationships, all as demonstrated in this portion of the brief. Among many other findings of the District Court in the present case, warranting the intervention of equity, is this most pertinent finding by the District Court (R. 56):

"Assuming, but not admitting, that the Union will file an unfair labor charge upon the plaintiff's refusal to bargain, the determination of the unfair labor charge by the Board, and the enforcement proceeding, are known to be prolonged and very time-consuming;

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23, *Infra*, p. 41.

24. The Board has obtained temporary injunctions, based upon probable cause, to compel collective bargaining against a union, *Douds v. International Longshoremen's Association*, (2 Cfr. 1957) 241 F. 2d 278, as well as against an employer, *Compton v. Sea-Land Service, Inc.*, No. 469-62, February 20, 1963 (D. C. Puerto Rico), 53 LRRM 2016. In *LeBus v. Maxwell, etc.*, No. 9510 (D. C. W. D. La.), June 27, 1963, 54 LRRM 2122, the Court granted a Section 10(j) injunction against an employer, which was technically refusing to bargain pending a court of appeals review. The Court held that "there is neither statutory nor decisional support for the proposition that an employer may legally withhold recognition from the union until some uncertain future date, when all administrative proceedings have been exhausted, court review obtained, writs acted upon, and an enforcement order obtained," at 54 LRRM 2128.



and picketing of the plaintiff by the Union while the case is being decided by the Court of Appeals could mean complete economic ruin to the plaintiff. Even if the plaintiff would ultimately prevail, its victory would, indeed, be a pyrrhic one. In the light of the foregoing, one is compelled to conclude that the said method of review, allegedly available to the plaintiff, is not an adequate remedy."

At page 26, footnote 30, of the Board's brief, two cases are cited holding that *Kyne* can never apply to suits by employers. The first case is *Leedom v. International Brotherhood of Electrical Workers*, (D. C. Cir. 1960) 278 F. 2d 237. This was an action by a union and an employer to enjoin the Board from conducting an election. The issue before the Court was whether or not the Board had authority retroactively to apply a new "contract bar" policy, which was an internal policy in no way controlled by statute. The Court cited *Kyne*, and stated, at page 239:

"To obtain review of such determination in an original equity suit in the District Court, 'there must be a showing "of unlawful action by the Board and resulting injury . . . by way of departure from statutory requirements or from those of due process" '."

The other case is *Atlas Life Insurance Company v. Leedom*, (D. C. Cir. 1960) 284 F. 2d 231. In the *Atlas* case, the employer sought an injunction to void certification of a union on the ground that no hearing had been held to test the compliance by the union with the non-communist affidavit requirements of the Act. In affirming a dismissal by the District Court, the Court of Appeals held:

"In directing a representation election, the National Labor Relations Board noted that the union had complied with these requirements."

The Court specifically referred to and distinguished *Leedom v. Kyne*.

The Board's brief also argues, in footnote 30, that a certification would be followed by a refusal to bargain charge, rather than by a strike. There is no basis for the Board's speculation in this matter. The Board further argues that there is no reason to believe that District Court review reduces rather than increases the danger of a strike or picketing by the union, and says that despite the injunction, the union remains free to strike or picket. The Union is not free to strike or picket Greyhound where Greyhound is not the employer. Section 7 of the Act does not confer the right to such collective activities, because the strike could not be for the purposes of collective bargaining with respect to one who could not, as a matter of law, bargain with the Union. A strike or picketing, under such circumstances, would be for the purpose of causing Greyhound to cease doing business with Floors, and would thus be a violation of Section 8(b)(4)(B) of the Act,<sup>3a</sup> which a district court may enjoin under Section 10(1) of the Act (*infra*, page 41).

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24a. "It shall be an unfair labor practice for a labor organization or its agents—

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(B) forcing or requiring any person . . . to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9."

### 3. THE BOARD HAS MADE A PLAIN ERROR OF STATUTORY CONSTRUCTION.

This argument is thoroughly discussed in part I of this brief, *supra*, pp. 10-17. The Board argues that, as distinguished from *Leedom v. Kyne*, the present case involves an error attributed to the Board in evaluating the particular facts of this case. District Court jurisdiction was found appropriate in *Kyne*, where no factual dispute was involved, because the Board had made an error of statutory construction. In the present case, that is precisely what the Board did, and the error was plainly contrary to the limitations placed upon the Board by the Congress by the 1947 amendment to Section 2(3) (see legislative history, *supra*, part I, this brief). The Board argues, at pages 28 and 29 of its brief, that a person is a joint employer of particular employees when he possesses power to control the terms and conditions of their employment. In support of this argument, the Board first cites *National Labor Relations Board v. Condenser Corporation*, (3 Cir. 1942) 128 F. 2d 67. In that case, the Board found, and the Court concurred, that the two corporations were affiliated through common ownership of their stock and that one was the wholly-owned subsidiary of the other. There was substantial evidence that both corporations maintained direct control of the labor relations policy and activities. Moreover, *Condenser* was decided five years prior to the 1947 amendment to Section 2(3) of the Act.

The Board next cites *National Labor Relations Board v. Long Lake Lumber Co.*, (9 Cir. 1943) 138 F. 2d 363. In that case, the Court found that there was sufficient evidence to indicate a domination of one employer over another, inconsistent with an independent contractor relationship. In deciding that the two companies were joint employers, the Court expressly rejected the common-law test to determine whether or not an independent contractor relationship existed. This case preceded the 1947 amendment to Section 2(3) of the Act by some four years, and

followed the reasoning in *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, which case was expressly nullified by the Congress.<sup>25</sup>

In support of the same argument, the Board cites *West Texas Utilities Co.*, 108 NLRB 407, enforced, 218 F. 2d 824. That case did not involve a question of representation or bargaining, but involved the discrimination provisions of the Act (Sections 8(a)(1) and (3)). The Board found that there was a contract between one employer and another by which the dominant employer had delegated to another the right to remove employees from the work. The Board held, in part: "Normally, under such an arrangement, responsibility for the hire, pay and discharge of employees on the job would be vested in Southwest," but the Court found that the right to discharge had been expressly delegated by contract so that both employers were necessarily responsible for a wrongful discharge.

In *Macy's San Francisco & Seligman*, 120 NLRB 69, two employers were held to be joint employers where the lessee had ceded its bargaining rights to the lessor, who had in turn ceded those rights to an employers' council, and employment as well as termination of employment was subject to clearance through the lessor. This case was not judicially reviewed.

The Board also cites, in footnote 33 of its brief, *Panther Coal Company*, 128 NLRB 409. This determination, not judicially reviewed, turned upon the fact that two of the companies involved were in all respects an integral part of the third, rather than independent contractors, a fact which was stipulated to by the employer and the union.

At page 29 of the Board's brief, it is insisted that the question of statutory construction in the present case was a mixed question of law and fact, citing *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U. S. 504. The *O'Leary* case is a complex case involving compensation under the Longshore-

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25. *Supra*, pp. 10, 11.



men's and Harbor Workers' Compensation Act of 1927, and is completely inapplicable to the question presented.

However, the fact that only a question of law exists in the present case is demonstrated by this Court's opinion in *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, involving an action by the Postmaster General in excess of his statutory powers. The Court, at page 109, held that the interpretation of the Postmaster General was " . . . a pure mistake of law on his part, because the facts, being conceded, whether they amounted to a violation of the statutes would be a legal question, and not a question of fact." The Court then held, at page 110, that a clear mistake of law, applied to admitted facts, gave the Court power in a proper proceeding to grant relief.

In *Site Oil Company v. National Labor Relations Board*, (8 Cir. 1963) 319 F. 2d 86, at page 90, the Court stated:

"If the facts before the Board were such that all reasonable minds must honestly draw the conclusion that the status of the lessees was that of independent contractors, the question would, of course, become a question of law rather than one of fact."

The *Site* case was one wherein the Court found an absence of an employer-employee relationship, because of the 1947 amendment to Section 2(3) of the Act.

The Board's clear error of statutory construction was in finding Greyhound to be an employer with respect to employees not its own, where the Board's findings of fact clearly show a complete absence in Greyhound of the right to control those elements of the employment relationship necessary to collective bargaining.

The instant case did not require the District Court to make any determination of fact reserved by the Act to the Board and the Courts of Appeal. As the District Court found (R. 58), there were no issues of fact in the instant case.

**CONCLUSION.**

~~For the foregoing reasons, the judgment of the Court  
of Appeals should be affirmed.~~

Respectfully submitted,

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September, 1963.



## **APPENDIX.**

Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 160(j)):

"The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper."

Section 10(l) of the National Labor Relations Act, as amended (29 U. S. C. 160(l)):

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of



the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law. . . ."

Relevant provision of the Judicial Code (62 Stat. 931, 28 U. S. C. 1337):

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. (June 25, 1948, c. 646, § 1, 62 Stat. 931.)"